DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-9000
Title: Henry W. Skinner, Petitioner
v.
Lynn Switzer, District Attorney for the 31st Judicial District of Texas
Docketed: February 12, 2010
Linked with 09A743
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (10-70002)
Decision Date: January 28, 2010
Discretionary Court
Decision Date: January 20, 2010

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Feb 12 2010	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 15, 2010)
Feb 12 2010	Application (09A743) for a stay of execution of sentence of death, submitted to Justice Scalia.
Mar 15 2010	Brief of respondent Lynn Switzer, District Attorney for the 31st Judicial District of Texas in opposition filed.
Mar 19 2010	Reply of petitioner Henry W. Skinner filed.
Mar 23 2010	Response to application from respondent Lynn Switzer, District Attorney for the 31st Judicial District of Texas filed.
Mar 24 2010	Reply of applicant Henry W. Skinner filed.
Mar 24 2010	Application (09A743) referred to the Court.
Mar 24 2010	Application (09A743) granted by the Court. The application for stay of execution of sentence of death presented to Justice Scalia and by him referred to the Court is granted pending disposition of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.
Apr 1 2010	DISTRIBUTED for Conference of April 16, 2010.
Apr 19 2010	DISTRIBUTED for Conference of April 23, 2010.
Apr 26 2010	DISTRIBUTED for Conference of April 30, 2010.
May 10 2010	DISTRIBUTED for Conference of May 13, 2010.
May 17 2010	DISTRIBUTED for Conference of May 20, 2010.
May 24 2010	Motion to proceed in forma pauperis and petition for a writ of certiorari

	GRANTED.
Jun 4 2010	Motion to appoint counsel filed by petitioner Henry W. Skinner. (CL Page 163)
Jun 23 2010	Motion DISTRIBUTED for Conference of September 27, 2010.
Jun 23 2010	DISTRIBUTED for Conference of September 27, 2010.
Jun 23 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including July 22, 2010.
Jun 23 2010	The time within which to file respondent's brief on the merits is extended to and including September 9, 2010.
Jun 23 2010	Counsel for petitioner agrees to file any reply brief on the merits on or before September 27, 2010.
Jul 20 2010	SET FOR ARGUMENT ON Wednesday, October 13, 2010.
Jul 22 2010	Brief of petitioner Henry W. Skinner filed.
Jul 22 2010	Joint appendix filed. (Statement of costs filed)
Jul 29 2010	CIRCULATED.
Aug 17 2010	Record received from U.S.C.A. for 5th Circuit. (1 envelope)
Aug 23 2010	Record received from U.S.D.C. for Northern District of Texas.
Sep 2 2010	Letter from counsel for respondent regarding proposed lodging. (Distribured).
Sep 7 2010	Letter from counsel for petitioner opposing proposed lodging. (Distributed).
Sep 8 2010	Letter from counsel for respondent in reply to opposition to proposed lodging. (Distributed).
Sep 9 2010	Brief of respondent Lynn Switzer, District Attorney for the 31st Judicial District of Texas filed. (Distributed)
Sep 16 2010	Brief amicus curiae of National Crime Victim Law Institute filed. (Distributed)
Sep 16 2010	Brief amici curiae of Tarrant County Criminal District Attorney, et al. filed. (Distributed)
Sep 16 2010	Brief amici curiae of Alaska, et al. filed. (Distributed).
Sep 16 2010	Brief amicus curiae of National District Attorneys Association filed. (Distributed)
Sep 27 2010	Reply of petitioner Henry W. Skinner filed. (Distributed)
Sep 28 2010	Motion to appoint counsel filed by petitioner GRANTED. Robert C. Owen, Esquire, of Austin, Texas, is appointed to serve as counsel for the petitioner in this case.
Oct 13 2010	Argued. For petitioner: Robert C. Owen, Austin, Tex. (Appointed by this Court.) For respondent: Gregory S. Coleman, Austin, Tex.

PETITION
FOR
WRIT OF
CERTIORARI

No. ____________

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2009

HENRY W. SKINNER,
Petitioner,

-v-

LYNN SWITZER, DISTRICT ATTORNEY FOR THE 31ST JUDICIAL DISTRICT OF TEXAS
Respondent.

PETITION FOR WRIT OF CERTIORARI

PETITIONER IS SCHEDULED TO BE
EXECUTED ON FEBRUARY 24, 2010

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QUESTION PRESENTED
(CAPITAL CASE)

For ten years, Henry W. Skinner has sought access to DNA testing that could prove him innocent of the murders that landed him on Death Row. After the Texas courts arbitrarily turned back his diligent attempts to take advantage of state statutes affording such relief, he sued in federal court under 42 U.S.C. § 1983 to vindicate his due process right to "'fundamental fairness in [the] operation'" of Texas's scheme. *Dist. Att'y's Office v. Osborne*, 129 S. Ct. 2308, 2320 (2009) (citation omitted). The district court dismissed Mr. Skinner's § 1983 suit solely on the ground that his claim sounded only in habeas corpus, and the Fifth Circuit summarily affirmed. The question presented is the same one the Court granted certiorari in *Osborne* to decide, but left unresolved:

May a convicted prisoner seeking access to biological evidence for DNA testing assert that claim in a civil rights action under 42 U.S.C. § 1983, or is such a claim cognizable only in a petition for writ of habeas corpus?

LIST OF PARTIES

The Petitioner, Henry Watkins Skinner, is a Texas death row prisoner at the Polunsky Unit of the Texas Department of Criminal Justice, Correctional Institutions Division.

The Respondent, Lynn Switzer, is the District Attorney for the 31st Judicial District of Texas.

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Petitioner Henry Watkins Skinner ("Mr. Skinner" or "Petitioner"), by counsel, respectfully asks this Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the dismissal of Mr. Skinner's 42 U.S.C. § 1983 civil rights claim as barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).

OPINIONS BELOW

The Fifth Circuit's decision, *Skinner v. Switzer*, No. 10-70002, 2010 WL 338018 (5th Cir. Jan. 28, 2010) is reproduced at App. A. The district court's decision, including the magistrate judge's report and recommendation, *Skinner v. Switzer*, No. 2:09-CV-0281, 2010 WL 273143 (N.D. Tex. Jan 20, 2010), is reproduced at App. B.

JURISDICTION

The Judgment below was entered on January 28, 2010. No rehearing petition was filed. Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

This case turns on two sets of statutes. The first, 42 U.S.C. § 1983, states in relevant part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

> shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Civil Action for Deprivation of Rights, 42 U.S.C.A. § 1983 (West 2010).

The other relevant statutes, 28 U.S.C. §§ 2241-2255, which govern federal habeas corpus proceedings, are attached hereto at App. C due to their length.

INTRODUCTION

The Court granted certiorari only last term on the very question presented here—only to leave that question undecided. In *Dist Att'y's Office v. Osborne*, 129 S. Ct. 2308 (2009), the Court granted review to determine, as a threshold matter, whether a prisoner can seek post-conviction DNA testing through a civil rights action under 42 U.S.C. § 1983 and, if so, whether the prisoner in that case was entitled to prevail on the merits. After observing that the former question was a "difficult" one, the Court found it unnecessary to resolve it because of the manner in which it disposed of the second issue. *Osborne*, 129 S. Ct. at 2319. The circumstances that prompted the Court to grant certiorari on the threshold issue in *Osborne* persist today. This case provides the Court with the opportunity to provide further, much-needed guidance about where the boundary lies between 42 U.S.C. § 1983 and the habeas corpus statutes, and to do so in the much-litigated area of post-conviction DNA testing.

Certiorari is warranted for four reasons. First, the circuit courts of appeals are—and have long been—in direct conflict on this important and recurring issue. Several circuits, contrary to the view taken by the Fifth Circuit in Petitioner's case, have held that a § 1983 action is the proper vehicle for a convicted person to use in seeking access to evidence for DNA testing. The conflict has manifested itself again in the eight months since *Osborne* was decided. Only this Court can resolve that stark divide.

Second, certiorari is warranted because the decision below appears to collide with this Court's pre-*Osborne* precedent fixing the boundary between prisoner civil rights actions and federal habeas corpus. By accepting review, this Court can prevent further erosion of that clear dividing line, in which the Court has invested significant effort to maintain.

Third, this case presents an important and much-litigated legal issue worthy of the Court's consideration. As noted, this case implicates the delicate relationship between the habeas corpus statutes and § 1983. But it also touches on the recurring and relevant issue of the importance of DNA testing in exonerating the innocent and the urgent need for the Nation's federal courts to treat such claims uniformly. Under the current circuit split, lower courts' treatment of federal civil rights suits for access to DNA evidence post-conviction is profoundly unequal. Prisoners in the First, Second, Third, Ninth, and Eleventh Circuits can proceed with such actions, while those in the Fourth and Fifth Circuits find the courthouse doors altogether closed to such claims.

Finally, this case presents the issue for resolution clearly and discretely. The courts below decided this case solely on the ground that it could not be brought as a § 1983 action, giving this Court the opportunity to address this important question without being required to address other issues, as was the case in *Osborne*. At the same time, though, the Court can be confident that it is addressing this legal issue in a case where, should the Court allow his § 1983 action to proceed, the petitioner has a genuine prospect of prevailing on the merits and, perhaps, ultimately proving his innocence

STATEMENT OF THE CASE

A. Mr. Skinner's Conviction and Post-Conviction Proceedings

Mr. Skinner is confined on death row in Texas. He was convicted by a jury and sentenced to death by the 31st Judicial District Court of Gray County, Texas, in 1995 for the murders of his live-in girlfriend Twila Busby and her sons Elwin Caler and Randy Busby. The conviction and sentence were upheld on direct appeal by the Court of Criminal Appeals of Texas ("CCA"). *Skinner v. State*, 956 S.W.2d 532, 546 (Tex. Crim. App. 1997).

On March 26, 1998, Mr. Skinner initiated habeas corpus proceedings in state court pursuant to Article 11.071 of the Texas Code of Criminal Procedure, alleging that the conduct of his trial resulted in the denial of certain federal constitutional rights. That action was ultimately dismissed by the CCA on grounds that the state courts would not consider his claims while they were also pending in federal court. *See Ex parte Skinner*, No. 20,203-03 (Tex. Crim. App. Jan. 27, 1999) (not designated for publication); *Ex parte Skinner*, No. 20,203-04 (Tex. Crim. App. Oct. 10, 2001) (not designated for publication).

Mr. Skinner federal petition for writ of habeas corpus was filed in the Northern District of Texas on February 4, 1999. That petition was ultimately denied on February 22, 2007. *See Skinner v. Quarterman*, No. 2:99-CV-0045, 2007 WL 582808, at *1 (N.D. Tex. Feb. 22, 2007) (not designated for publication), *aff'd*, 576 F.3d 214 (5th Cir. 2009). After granting a certificate of appealability on two issues, *see Skinner v. Quarterman*, 528 F.3d 336, 345-46 (5th Cir. 2008), the Fifth Circuit affirmed the denial of habeas corpus relief on July 14, 2009. *Skinner v. Quarterman*, 576 F.3d 214, 216 (5th Cir. 2009). On November 25, 2009, Mr. Skinner filed a petition for writ of certiorari in this Court. (*See* Petition for Writ of Certiorari, *Skinner v. Thaler*, No. 09-7784 (*petition for cert. filed* Nov. 25, 2009).) That petition is set for conference on February 19, 2010.

On October 20, 2009, without giving Mr. Skinner's attorneys any notice or an opportunity to be heard, the convicting court entered an order directing that Mr. Skinner be executed by intravenous injection on February 24, 2010. (*See* Petitioner's Application for Stay of Execution (filed with this Petition).)

B. Mr. Skinner's Efforts to Obtain Access to Evidence Using State Procedures

Long before filing this case in federal court, Mr. Skinner attempted several times to obtain access to physical evidence that might exonerate him and in each instance was denied relief. Beginning as early as 2000, Mr. Skinner made several requests of each of the district attorneys who, over time, came into office—including Respondent Switzer—asking for the opportunity to subject certain as-yet untested physical evidence to DNA testing. All of those requests were ignored or denied.

Mr. Skinner also twice attempted to obtain access to the requested DNA evidence through Chapter 64 of the Texas Code of Criminal Procedure, which allows prisoners to seek post-conviction DNA testing, *see* Tex. Code Crim. Proc. Ann. art. 64.01(b) (Vernon 2006 & Supp. 2009). Mr. Skinner's motions under Article 64, however, were both ultimately denied. His first motion—under an earlier version of Texas's post-conviction DNA testing statute—was denied because the CCA engaged in an arbitrary and capricious reading of test results obtained by the District Attorney when he unilaterally sent certain evidence to a private lab for limited DNA testing in 2000. *See Skinner v. State,* 122 S.W.3d 808, 811 (Tex. Crim. App. 2003) ("*Skinner I*").[1] *See also Collins v. Harker Heights, Texas,* 503 U.S. 115, 128 (1992) (arbitrary governmental action can be a denial of due process).

When Mr. Skinner, newly armed with detailed information rebutting the court's previous distortion of the facts, brought a second DNA testing motion, the CCA abandoned the rationale of its first decision and instead shifted to a new justification—that Texas's statute should be read to foreclose DNA testing for any prisoner who could have asked for such testing prior to trial but did not. *Skinner v. State,* 293 S.W.3d 196, 202 (Tex. Crim. App. 2009) ("*Skinner II*"). This decision was also irrational when applied to Mr. Skinner, given that Texas had no post-conviction DNA testing statute at the time of his trial and that Mr. Skinner had never knowingly waived his right to have the DNA evidence tested.[2] More than that, this rationale requires the defendant who wishes to exercise his constitutional right to put the State to its burden of proof—including the innocent defendant who might nevertheless have had occasion to leave his own DNA at the scene—to forever waive the opportunity to prove his innocence by DNA testing.

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[1] The court concluded that even if Mr. Skinner obtained exonerating results from the DNA testing he sought, they could not overcome the fact that the lab had found a mixed profile of Twila Busby's and Mr. Skinner's DNA on a hair found in Ms. Busby's hand because, the court irrationally reasoned, that mixture "probably" occurred "during the time when she was struggling for her life." *Skinner I,* 122 S.W.3d at 811. Furthermore, the court relied on this extra-judicial evidence without giving Mr. Skinner an opportunity to question it in an adversarial proceeding. (*See* Complaint at ¶¶ 23-25, *Skinner v. Switzer*, No. 2:09-CV-0281, 2010 WL 273143 (N.D. Tex. Jan. 20, 2010).)

C. Mr. Skinner's Reasons for Seeking Access to DNA Evidence

Mr. Skinner has always maintained that he is innocent of the crimes of which he was convicted and since his conviction has tirelessly pursued access to the untested physical evidence. Testing of that evidence is particularly critical in light of recent evidence that further, and dramatically, casts doubt on Mr. Skinner's guilt.

The murders for which Mr. Skinner was convicted occurred on New Year's Eve 1993 in the home he shared with the victims in the small town of Pampa, Texas. The victims' injuries show that whoever murdered them must have possessed considerable strength, balance and coordination. Twila Busby was first manually strangled so forcefully that her larynx and the hyoid bone on the right side of her neck were broken. (Tr. 28:1186-87.)[3] She was then struck with an ax or pick handle fourteen times, so hard that fragments of her unusually thick skull were driven into her brain. (Tr. 28:1171-72, 28:1181-82, 28:1186, 28:1189, 28:1209.)

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[2] *Cf.* Innocence Protection Act, 18 U.S.C.A. § 3600(a)(3)(A)(i) (West 2010) (a prisoner's having declined to pursue DNA testing prior to trial will bar a request for post-conviction testing *only* if the prisoner himself knowingly and voluntarily waived that right *and* if the waiver occurred after the enactment of the statute making post-conviction testing possible).

[3] "Tr." refers to the state court trial transcript.

While attacking Ms. Busby, the perpetrator had to contend with the presence of her six-foot, six-inch, 225-pound son, Elwin Caler, who, blood spatter analysis showed, was in the immediate vicinity of his mother as she was being beaten. (Tr. 24:216-17, 28:1211.) Somehow, the murderer was able to change weapons and stab Caler several times before he could fend off the attack or flee. (Tr. 28:1193-95.) The killer then went to the bedroom shared by the two sons and stabbed to death Randy Busby, who was lying face down in the top bunk of his bed. (Tr. 24:119, 24:134.) By their nature, these were the acts of a person possessing considerable presence of mind and physical coordination.

Mr. Skinner undoubtedly was inside the house when these brutal attacks occurred. Yet there is substantial reason to doubt that Mr. Skinner could have committed the murders, given the abundant evidence that he was completely incapacitated by the extreme quantities of alcohol and codeine he had consumed earlier that evening. Howard Mitchell, an acquaintance who was holding a New Year's Eve party several blocks away, drove to the Busby residence at about 10:15 p.m. that evening with the intention of giving both Mr. Skinner and Ms. Busby a ride to his party. When Mitchell got there, however, he found Mr. Skinner unconscious on the couch, with a vodka bottle near him on the floor. (Tr. 26:575-77, 26:605.) Mitchell tried to wake Mr. Skinner by jerking his arm forcefully and shouting at him, but Skinner remained unconscious and "kind of comatose." (Tr. 26:606-08, 26:611.) After waiting fifteen minutes, during which time Mitchell "never s[aw] him move at all," Mitchell left Skinner on the couch and took only Ms.

Busby to the party. (Tr. 26.611.) Mitchell testified that it would have been impossible for anyone in Mr. Skinner's condition to have recovered sufficiently to commit three murders only ninety minutes later. (Tr. 26:608, 26:622.)

Mr. Skinner's condition was also observed shortly *after* the murders by Andrea Reed, an acquaintance who lived a few blocks away. Ms. Reed has testified that around midnight Mr. Skinner knocked on her door and asked to be let in. She described him as being so drunk he couldn't even climb the few steps into her trailer house, falling over backwards when he tried to do so. (R. II:148, II:150-51.)[4] Once Ms. Reed got him inside, Mr. Skinner was, according to Ms. Reed, incoherent and too impaired to perform even such simple tasks as going to the bathroom or removing his shirt.[5] (R. II:148, II:153-55.)

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[4] "R." refers to the transcript of Mr. Skinner's federal habeas corpus hearing.

[5] Ms. Reed testified differently—and incorrectly, as she later explained—at trial. There, she said that Mr. Skinner entered her house on his own, against her will, and that while there he was able to perform simple tasks without her assistance. At the federal evidentiary hearing, however, Ms. Reed admitted—in the face of threats by the State that she could be prosecuted for perjury if she changed her testimony—that she lied at trial because she was afraid she would be charged as an accessory if she had told the truth about having helped Mr. Skinner into her house. The federal magistrate judge who heard Ms. Reed's recantation testimony failed to credit it, *see Skinner v. Quarterman*, 2007 WL 582808, at *15-16. However, at least that portion of Ms. Reed's later description of Mr. Skinner's condition was more consistent with the other undisputed evidence about the extreme degree of Mr. Skinner's intoxication on the night of the crime than the version to which she testified at trial. In any event, the fact that Ms. Reed was willing to make that post-trial recantation, even after being threatened by the District Attorney with perjury charges if she persisted in changing her testimony, only contributes to the troubling, unresolved questions about whether Mr. Skinner could have committed the murders.

Dr. William Lowry, a toxicologist experienced in the effects of alcohol and drugs on human performance, gave expert testimony that Mr. Skinner was too impaired by alcohol and codeine in his system to have committed the murders. Blood was drawn from Mr. Skinner after he was arrested and taken into custody. Dr. Lowry's analysis of that sample showed that as of midnight, Mr. Skinner's blood alcohol level was .21 percent—almost three times the drunk driving standard in Texas—and his blood codeine level was .4 mg/l—two and a half times the normal therapeutic dose. (Tr. 29:1356-58, 29:1369, 30:1464-65.) Dr. Lowry testified that combining these two substances produces a synergistic effect that greatly increases the potency of each. (Tr. 29:1354, 29:1360-61, 30:1462-63.) In Dr. Lowry's opinion, at midnight Mr. Skinner was at best in a "stuporous" condition—such that it would have required all of his physical and mental agility just to stand—and therefore he could not have caused the deaths of the three victims.[6] Dr. Lowry felt even more convinced of that opinion when he learned years after the trial that blood spatter evidence showed Elwin Caler to have been in the room when his mother was murdered and that Mr. Skinner had previously avoided codeine because he thought he was allergic to it. As Dr. Lowry said at that time, "it has been difficult for me to live" with the results of the trial because "I have never known a verdict of the jury to be so at variance with what I believe to be scientific fact." (Affidavit of Dr. William T. Lowry, appended to Mr. Skinner's First Amended Petition for Writ of Habeas Corpus at Ex. 8, ¶ 6, *Skinner v. Quarterman*, 2:99-CV-0045 (N.D. Tex., Feb. 22, 2007).)

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[6] Additionally, an occupational therapist specializing in hand injuries testified at trial that, as a result of an injury to Mr. Skinner's right hand sustained six months before the murders, his grasping strength in that hand was half that of his left hand and less than half of what would be expected of a normal right-handed person. (Tr. 29:1317-18.) This would have made it unlikely that Mr. Skinner could have grasped Twila Busby's throat with enough force to break her larynx and hyoid bone even if he had not been massively intoxicated by alcohol and codeine. (Tr. 29:1316, 29:1318-19.)

There is also troubling evidence in this case that Twila Busby's uncle, Robert Donnell, was the real murderer—a possibility that the prosecution failed to investigate or even consider. Evidence was presented by the defense at trial that Donnell was a hot-tempered ex-con who had sexually molested a girl, grabbed a pregnant woman by the throat, and kept a knife in his car. (Tr. 26:615-18, 26:619, 29:1281, 29:1296, 29:1300-01.) Donnell was present, drunk, at Mitchell's New Year's Eve party. During the short time Twila Busby was there, Donnell stalked her, making crude and annoying sexual remarks. (Tr. 26:619-20, 29:1277, 29:1281.) Mitchell "sensed that [Donnell] would be a danger," and when Twila asked Mitchell to take her home from the party, which he did around 11:15 p.m., he noticed that she was "fidgety and worried." (Tr. 26:618, 26:629.) When Mitchell returned to his party, Donnell was no longer there. (Tr. 26:629; 29:1289.) Mitchell later told law enforcement that he believed that Donnell could have murdered Twila. (Tr. 26:623.)

The evidence presented at trial of Donnell's possible involvement only scratched the surface of what was available and could have been presented. Mr. Skinner showed in his federal habeas proceeding that his trial counsel stopped their investigation of him without having a strategic justification for doing so, and thus failed to discover far more troubling information. (*See* Petition for Writ of *Certiorari* at 27-29, *Skinner v. Thaler*, No. 09-7784 (*petition for cert. filed* Nov. 25, 2009).) That information included testimony by Debra Ellis, who as of the time of the murders had lived next door to Donnell for three years. (R. I:34.) She testified that Donnell was a "[v]ery big guy," who drank heavily, had a temper that worsened when he was drinking, and regularly threatened to harm people with whom he had a disagreement. (R. I:28-30.) Ms. Ellis saw Donnell grab his wife by the throat and lift her off the floor, and was told by his wife, while she was still hysterical from the incident, that on another occasion Donnell had put a gun to her head and threatened to blow it off. (R. I:49-50.) Ms. Ellis, who was also present when police informed Donnell that his niece and both her sons had been murdered, said he showed "no emotion at all" in response to the shocking news, (R. I:39), acting like it was "[j]ust an ordinary normal day." (R. I:26.) Most significant, Ms. Ellis testified that within a day or two after the murders, Donnell dismantled the inside of his "old beat up truck" and gave it an hours-long, almost fanatical cleaning that included removing both the carpet and the seats and scouring the metal interior with an astringent solution. (R. I:23-24.)

Mr. Skinner is asking that seven items be tested: (1) vaginal swabs taken from Twila Busby at the time of her autopsy; (2) Twila Busby's fingernail clippings; (3) a knife found on the front porch of the Busby house; (4) a knife found in a plastic bag in the living room of that house; (5) a dishtowel also found in that bag; (6) a windbreaker jacket found in the living room next to Ms. Busby's body; and (7) any hairs found in Ms. Busby's hands that have not been destroyed by previous testing. Depending on the results, testing of these items could prove his innocence.

Testing the vaginal swabs could yield important results because Ms. Busby was found with her shirt pulled up and her pants unzipped. (Tr. 24:229.) The medical examiner found erythema, or reddening of the skin, around her vaginal area, indicating recent sexual activity. (Tr. 28:1206.) The identity of the person with whom she had sex shortly before her murder could shed important light on who might have attacked her. The failure of the State to test these swabs is inexplicable. The same is true of Ms. Busby's fingernail clippings, which, if she struggled with her attacker, could yield the presence of his DNA. Similarly, the medical examiner acknowledged that the hairs found in her right hand could have come from her murderer. (Tr. 28:1216.) The knives, either of which could have been used to kill Ms. Busby's two sons, could likewise yield the DNA of the person who used them. In addition, the *absence* of Mr. Skinner's blood on those knives would disprove the prosecution's theory that the profusely bleeding cut in the palm of Mr. Skinner's hand was not a defensive wound but instead was self-inflicted when the knife he used to kill Randy Busby first struck Busby's shoulder blade, causing Mr. Skinner's hand to slide down the blade. (*See* Tr. 28:1203.) The bloody dish towel could have been used by the killer to wipe blood from his hands. And the ownership and presence of the windbreaker jacket next to Ms. Busby's body has never been explained. It is similar to one Robert Donnell was often seen wearing.

(R. 1:30), was Donnell's size, and contained hairs and sweat stains that, if tested, could identify its owner.

Thus, while Mr. Skinner was convicted of capital murder, there are disturbing and unresolved questions about the accuracy of the jury's verdict. Exculpatory DNA results, when coupled with the evidence described above and more fully in the Stay Application, could show that Mr. Skinner is innocent. Such results could also identify the true killer. Moving forward with Mr. Skinner's execution despite the existence of potentially critical DNA evidence that has remained untested "'transgresses any recognized principle of fundamental fairness in operation.'" *Osborne*, 129 S. Ct. at 2320 (quoting *Medina v. California*, 505 U.S. 437, 446, 448 (1992)). The case before the Court will not establish Mr. Skinner's innocence, or at this stage even give him access to the DNA evidence, but it would at least give him the opportunity to persuade a federal court that the State's refusal to give him access to DNA testing has violated his rights under the Due Process clause, a necessary first step toward possible exoneration.

D. Mr. Skinner's § 1983 Claim

Mr. Skinner filed his § 1983 suit in federal district court on November 27, 2009. Mr. Skinner alleged that he possesses state-created, constitutionally protected liberty and life interests in seeking state habeas relief or clemency with exculpatory DNA evidence. Accordingly, he alleged, Respondent's continued refusal to provide such evidence for DNA testing denied him due process and access to the courts and threatened him with cruel and unusual punishment. Mr. Skinner sought a preliminary and permanent injunction requiring Ms. Switzer to provide him access to the requested evidence for the purpose of performing DNA testing.

E. The District Court's Determination

On January 20, 2010, the district court issued an order[7] dismissing Mr. Skinner's action and finding, *inter alia*,[8] that his Complaint failed to state a claim upon which relief could be granted. After briefly discussing *Heck* and *Wilkinson v. Dotson*, 544 U.S. 74 (2005), the court found itself bound by *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir. 2002), to conclude that Mr. Skinner's § 1983 claim was barred by *Heck*. The court noted that *Kutzner* had not yet been overruled by the Fifth Circuit despite this Court's arguably inconsistent intervening decision in *Dotson* and would, therefore, bind other Fifth Circuit panels. Considering itself similarly bound, the court held that "plaintiff Skinner's § 1983 claims are cognizable only in habeas corpus." *See* App. B at 6.

F. The Fifth Circuit's Decision Below

Mr. Skinner immediately filed an appeal under 28 U.S.C. § 1291 and asked that it be expedited. Before accepting any briefing, the panel issued an unpublished opinion summarily affirming the district court. *See* App. B. The panel disposed of the appeal based on *Kutzner* and *Richards v. Dist. Att'y's Office*, No. 09-10144, 2009

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[7] On January 15, 2010, the magistrate judge to whom the case was assigned issued a Report and Recommendation that Petitioner's Complaint be dismissed, which the district court adopted in its entirety. *See* App. B at 1.

[8] The court also held that Mr. Skinner's claims were not barred by the *Rooker-Feldman* doctrine or *res judicata*. *See* App. B at 2-5, 6-7. Respondent did not appeal these determinations.

WL 4716025 (5th Cir. Dec. 10, 2009) (not designated for publication), which, like *Kutzner*, held that "an action by a prisoner for post-conviction DNA testing is not cognizable under § 1983 and must instead be brought as a petition for writ of habeas corpus." App. B.

REASONS THE COURT SHOULD GRANT REVIEW

As noted in the introduction, the same considerations that motivated the Court to grant certiorari in *Osborne* still exist today. Indeed, as will be shown below, the rift between the circuits has only intensified, making the need for this Court's guidance even more urgent.

I. Review Will Allow This Court to Finally Resolve the Longstanding Conflict Among the Circuits on the Question Whether *Heck* Bars a Prisoner's § 1983 Action That Seeks Access to Evidence for DNA Testing.

The so-called *Heck* doctrine is designed to eliminate any overlap between suits that can be brought by prisoners under 42 U.S.C. § 1983 and those that can be brought under the federal habeas corpus statutes. *Heck* draws the dividing line by instructing that a prisoner in state custody may not sue under § 1983 to challenge the fact or duration of his confinement, relegating that limited category of prisoner suits instead to the province of habeas corpus. *See Heck v. Humphrey*, 512 U.S. 477, 481 (1994). The *Heck* Court's precise formulation of the operative rule was as follows:

> [T]he district court must consider whether a judgment in favor of the plaintiff would *necessarily imply the invalidity of his conviction or sentence*; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already

> been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed in the absence of some other bar to the suit.

Id. at 487 (first emphasis added).

This Court has addressed the scope of the *Heck* rule on numerous occasions for various types of prisoner actions. In the sixteen years since *Heck*, however, the lower courts continue to be hopelessly split in their interpretation of the phrase "necessarily imply," particularly as it applies to post-conviction suits seeking access to evidence for DNA testing.

That precise issue was first addressed at the court of appeals level in 2002 by the Fourth Circuit in *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002), in which a panel majority held that *Heck* barred a prisoner's § 1983 suit even though the only relief sought was access to evidence for DNA testing. *Id.* at 374. The court reasoned that the plaintiff planned "to set the stage for a future attack on his confinement," *id.* at 378, and that intention was enough to meet the "necessarily implies" test set forth in *Heck*.[9] In that same year, in *Kutzner*, the Fifth Circuit, relying on *Harvey*, reached the same conclusion, asserting that Kutzner's § 1983 claim for access to DNA evidence sought to "'set the stage for a future attack on [the prisoner's] confinement.'" 303 F.3d at 341 (alteration in original) (citation omitted). The Fifth Circuit viewed the plaintiff's claim as "'so intertwined'" with an attack on his confinement that its "success would 'necessarily imply' revocation or modification of confinement." *Id.* at 341 (citation omitted).

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[9] The panel decision in *Harvey* on this issue was not unanimous. Judge King disagreed with the majority's reasoning that an action for DNA testing met the "necessary implication" test of *Heck*. As Judge King said, "[a]lthough Harvey might use the evidence, at some future date, to initiate a separate action challenging his conviction, future exculpation is not a necessary implication of Harvey's claim in this case." *Harvey*, 278 F.3d at 382-83 (King, J., concurring in part and dissenting in part). Furthermore, Judge Luttig of that court, while concurring in the denial of rehearing *en banc* in *Harvey* on the basis that an intervening change in state law had rendered Harvey's claim moot, expressed the view in a separate opinion that the panel majority had committed "fairly clear[ ]" error in holding that *Heck* would

(cont'd)

Just one month later, however, the Eleventh Circuit specifically rejected the reasoning outlined in *Harvey* and *Kutzner*, finding instead that nothing in the result sought by a plaintiff seeking only production of DNA evidence for testing "necessarily demonstrates or even implies that his conviction is invalid." *Bradley v. Pryor*, 305 F.3d 1287, 1290 (11th Cir. 2002).

The courts of appeals were thus split when this Court decided *Wilkinson v. Dotson*, 544 U.S. 74 (2005), a case which, although not involving a claim for post-conviction access to evidence, articulated the principle that a prisoner's § 1983 claim is not barred by the *Heck* doctrine even where the claim is intended as a first step toward obtaining a reduction in sentence. *See* Section III, *infra*, discussing *Dotson*. As this Court later noted in *Osborne*, *see* 129 S. Ct. at 2318, every circuit court of appeals that has considered the *Heck* issue in the context of a § 1983 action for DNA testing since *Dotson* has taken that opinion's lesson to heart and concluded that because a successful action for DNA testing would be, at most, only the first step in

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bar a § 1983 action for DNA testing. *Harvey v. Horan*, 285 F.3d 298, 304, 307 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc).

a long and uncertain process to win release, it does not "necessarily imply" the invalidity of the prisoner's conviction or sentence.

The first to do so was the Ninth Circuit in *Osborne*. *See Osborne v. Dist. Att'y's Office*, 423 F.3d 1050 (9th Cir. 2005), *rev'd on other grounds*, 129 S. Ct. 2308 (2009). The Seventh and Second Circuits soon followed suit. *See Savory v. Lyons*, 469 F.3d 667, 672 (7th Cir. 2006) ("We find the Eleventh and Ninth Circuits' interpretation and approach to be more consistent with [Supreme Court precedent]"); *McKithen v. Brown*, 481 F.3d 89, 99 (2d Cir. 2007) ("We today join the Seventh, Ninth, and Eleventh Circuits, and district courts in the First and Third Circuits, agreeing with them that a claim seeking post-conviction access to evidence for DNA testing may properly be brought as a § 1983 suit.").

The fact that this Court did not resolve the *Heck* issue in *Osborne*, despite having granted certiorari to do so, gave the Third Circuit little pause when it took up the question only last month. That court likewise joined the Second, Seventh, Ninth, and Eleventh Circuits in holding that, after *Dotson*, it is clear that § 1983 is an appropriate vehicle by which a prisoner can obtain post-conviction DNA testing.[10] *See Grier v. Klem*, No. 06-3551, 2010 WL 92483, at *5 (3d Cir. Jan. 12, 2010).

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[10] The question of whether the *Heck* doctrine applies to prisoner § 1983 claims seeking DNA evidence has also arisen at the district court level in circuits that have yet to weigh in on the issue. *See, e.g., McDaniel v. Suthers*, No. 08-cv-00223-WDM-MEH, 2008 WL 4527697, at *6-7 (D. Colo. Oct. 2, 2008) (noting circuit split and finding prisoner claim under § 1983 for DNA testing was not *Heck* barred), *aff'd*, 335 F. App'x 734 (10th Cir. Oct. 2, 2009); *Breest v. N.H. Att'y Gen.*, 472 F. Supp. 2d 116, 120 (D.N.H. 2007) (same).

The Fifth Circuit, though, stands steadfast in its position that *Heck* bars § 1983 actions for DNA testing. Indeed, in *Richards v. Dist. Att'y's Office*, No. 09-10144, 2009 WL 4716025 (5th Cir. 2009), decided only a month and a half before its decision in this case, the court went so far as to label any argument to the contrary as "frivolous" and potentially deserving of sanctions. *See id.* at *1 (dismissing appeal as frivolous in light of *Kutzner*, penalizing plaintiff with two strikes for purposes of 28 U.S.C. § 1915(g), and issuing sanction warning). Most notably, the Fifth Circuit has failed even to consider the impact of this Court's decision in *Dotson* on these cases, a fact noted below by the district court. *See Skinner v. Switzer*, No. 2:09-CV-0281, 2010 WL 273143, at *7 (N.D. Tex. Jan. 20, 2010) ("The Fifth Circuit has not ever discussed the *Dotson* decision in the context of its application to post-conviction requests for DNA evidence."), *aff'd*, 2010 WL 338018 (5th Cir. Jan. 28, 2010).

Bound by *Kutzner*, district courts throughout the Fifth Circuit have reflexively dismissed § 1983 actions seeking access to evidence for DNA testing. *See, e.g., id.* at *7; *Davis v. Quarterman*, No. 4:09-CV-003-Y, 2009 WL 1033646, at *2 (N.D. Tex. Apr. 17, 2009); *Richards v. Dist. Att'y's Office*, No. 4:08-CV-468-Y, 2009 WL 136927, at *1 (N.D. Tex. Jan. 20, 2009); *Crum v. Foti*, No. 08-57-C, 2008 WL 4297055, at *2 (M.D. La. Sept. 16, 2008); *Gilkey v. Livingston*, Nos. 3:06-CV-1903-D, 3:06-CV-1904-D, 3:06-CV-1905-D, 2007 WL 1953456, at *5 (N.D. Tex. June 27, 2007); *Leviege v. Hamlin*, No. 3:06-CV-1721-N, 2006 WL 3478400, at *2 (N.D. Tex. Dec. 1, 2006).

Thus, in the eight months since this Court issued its decision in *Osborne*, the courts of appeals have addressed the issue three times, once by the Third Circuit in *Grier*, and twice by the Fifth Circuit in *Richards* and this case. Their conflicting decisions show that the rift remains as deep as ever and requires resolution by this Court.

II. The Fifth Circuit's Application of *Heck* to § 1983 Claims for DNA Testing Is Inconsistent with This Court's Precedent.

Review is also warranted because the decision below seems on its face to conflict with *Heck* and its progeny. As discussed *supra*, *Heck* itself held that a prisoner is required to bring his claim in habeas, as opposed to an action under 42 U.S.C. § 1983, only where such claim would "necessarily imply the invalidity of [a criminal] conviction or sentence." *Heck*, 512 U.S. at 487. According to this Court, such actions were barred because "habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release . . . ." *See id.* at 481 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 488-490 (1973)).

Against this background, the Court in *Dotson* took up the case of two prisoners who challenged in a § 1983 action Ohio's retroactive application of new guidelines regarding parole eligibility, the effect of which were to delay the dates when the plaintiffs would became eligible for parole. After a thorough review of its jurisprudence in this area, this Court reaffirmed the *Heck* test that a prisoner's § 1983 suit was barred, and had to be brought in a habeas petition, only if "success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Dotson*, 544 U.S. at 81-82 (emphasis added); *see also id.* at 74 ("Section 1983 remains available for procedural challenges where success *would not necessarily* spell immediate or speedier release for the prisoner" (citing *Wolff v. McDonnell*, 418 U.S. 539 (1994))). Turning to the facts before it, this Court reasoned that success for Dotson did not mean immediate release from confinement or a shorter prison stay; it meant "at most new eligibility review, which at most will speed *consideration* of a new parole application." *Id.* at 82. Moreover, "[s]uccess for Johnson [the second prisoner] means at most a new parole hearing at which Ohio parole authorities may, in their discretion, decline to shorten his prison term." *Id.* Accordingly, this Court found that the prisoners' claim did not lie at the core of habeas corpus and held that a § 1983 action *was* the proper vehicle to challenge the parole board's retroactive application of its regulations. *Id.* at 84-85.

As with the plaintiffs' claims in *Dotson*, success on Mr. Skinner's suit "*would not necessarily* spell [his] immediate or speedier release." *See id.* at 81-82 (emphasis added). If Mr. Skinner prevails, the District Attorney will only be required to release evidence to him for DNA testing. The results of such testing could prove to be exculpatory, inconclusive, or inculpatory. Even if the results are exculpatory, Mr. Skinner's release from prison is in no way guaranteed. He would have to bring subsequent, independent proceedings (e.g., state habeas corpus proceedings or clemency proceedings) and satisfy still other strict standards for obtaining relief before securing release. Thus, the Fifth Circuit's ruling that Mr. Skinner cannot pursue DNA testing in a § 1983 action is contrary to the precedents of this Court, a conflict that will persist unless corrected.

Not only does the Fifth Circuit's *Kutzner* rule unduly restrict the scope of § 1983, but it also necessarily and impermissibly has the effect of broadening the scope of federal habeas. Section 1983 encompasses a wide variety of claims for redress of civil rights violations. *See Dotson*, 544 U.S. at 79 (describing § 1983's "broad scope"). Accordingly, the limited exception to § 1983 jurisdiction outlined in *Heck* is a narrow one, designed only to preserve the specific role of habeas corpus relief. *See, e.g., Savory*, 469 F.3d at 672. Recognizing the danger in upsetting the delicate balance between claims cognizable under the habeas corpus statute and those claims cognizable under § 1983, Justice Scalia explained:

> It is one thing to say that permissible habeas relief, as our cases interpret the statute, includes ordering a "quantum change in the level of custody," *Gram v. Broglin*, 922 F.2d 379, 381 (C.A. 7 1991) (Posner, J.), such as release from incarceration to parole. It is quite another to say that the habeas statute authorizes federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody.

Dotson, 544 U.S. at 86 (Scalia, J., concurring). Thus, over time, this Court has carefully circumscribed the *Heck* exception to make sure it does not swallow the rule. *See Dotson*, 544 U.S. at 79 (noting that the "implicit exception from § 1983's otherwise broad scope" . . . covers only those "actions that lie 'within the core of habeas corpus'") (citation omitted).

But the Fifth Circuit's approach to § 1983 cases, as exemplified by this case, would do exactly that. By its adherence to *Kutzner*, the Fifth Circuit ignores the limitation on habeas relief carefully constructed by this Court and by implication expands the reach of habeas well beyond its historical role. The Fifth Circuit, in barring Mr. Skinner's (and similar) claims, demands that prisoners employ the habeas writ to seek all manner of relief that "neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody" as mandated by the habeas statute. *Dotson*, 544 U.S. at 86 (Scalia, J., concurring). Placing such claims within the province of habeas corpus "utterly sever[s] the writ from its common-law roots." *Id.* Absent intervention by this Court, the Fifth Circuit's view as to where to draw the line between § 1983 and habeas could be read to require that any claims designed to "set the stage" for possible release from incarceration—including even claims for access to the tools needed to draft legal papers—must be brought in habeas. Indeed, courts in the Fifth Circuit have already begun to move in this absurd—yet foreseeable—direction. *See, e.g.*, *Cruz v. Bennett*, No. H-05-1954, 2005 WL 2000703, at *2 (Aug. 17, 2005) (relying on *Kutzner* to bar § 1983 claim seeking access to appellate slip opinions).

Accordingly, Petitioner respectfully urges the Court to grant certiorari to avoid further erosion by the Fifth Circuit of the boundary between 28 U.S.C. § 2254 and 42 U.S.C. § 1983.

III. This Case Presents An Important Legal Issue That Should Be Resolved By This Court.

A. This Case Raises a Recurring and Highly Relevant Issue in the General Debate Concerning the Role of Post-Conviction DNA Testing in the Criminal Justice System.

The specific issue raised in this case, i.e., whether *Heck* bars § 1983 actions brought by convicted persons seeking access to evidence for DNA testing, continues to be a relevant and recurring question throughout the federal courts. As noted above, since *Osborne*, the issue has arisen in at least three separate cases at the court of appeals level. *See Grier*, 2010 WL 92483, at *3-5; *Richards*, 2009 WL 4716025, at *1; *Skinner*, 2010 WL 338018, at *1.

It is inevitable that convicted persons will continue to seek access to DNA evidence. As this Court has recognized, "[m]odern DNA testing can provide powerful new evidence unlike anything known before . . . [and] DNA testing has exonerated wrongly convicted people, and has confirmed the convictions of many others." *Osborne*, 129 S. Ct. at 2316. The increasing potential for DNA to exonerate individuals is particularly vital in death penalty cases, where testing could potentially prevent the execution of a factually innocent person.

Additionally, DNA testing not only serves the interests of the innocent but also provides much needed closure to victims and their families by either confirming the conviction or, in the event of exoneration, positively identifying the actual perpetrator. *See* Kathryn M. Turman, *Understanding DNA Evidence: A Guide for Victim Service Providers*, U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime (April 2001), *available at* http://www.ojp.usdoj.gov/ovc/publications/bulletins/dna_4_2001/welcome.html ("[S]howing [crime victims] how DNA technology can empower the search for truth" can "strengthen [their] confidence in the judicial process."). Moreover, where an individual has been wrongly convicted, DNA testing serves the greater public interest by both exonerating an innocent person and, in many situations, removing from society an individual who would likely victimize others. *See, e.g.*, Justice for All Act of 2004: Hearing on the Importance of the Bloodsworth Program Before the S. Comm. on the Judiciary, 111th Cong. (2009) (testimony of Professor Keith A. Findley, President, Innocence Network (quoting a Minnesota prosecutor's comment that systematic application of forensic DNA testing to "convictions that were obtained before DNA testing was widespread" will "serve important interests in promoting public confidence in the criminal justice system and seeing that justice is done," as "[n]obody is served by a wrongful conviction")). Granting certiorari will allow this Court to prescribe a clear answer to the question of the manner in which a convicted person may request access to such DNA evidence.

B. The Court's Resolution of the Question Presented in This Case Will Inform the Federal Courts' Treatment of Other Forms of Relief Sought Under § 1983.

The issue presented in this case implicates other issues beyond the scope of relief in the form of DNA testing, including other kinds of evidentiary requests and challenges by prisoners to various actions taken by state officials. *See, e.g.*, *Summers v. Eidson*, 206 F. App'x 321, 323 (5th Cir. 2006) (applying *Kutzner* to bar a § 1983 claim for access to non-scientific evidence); *Cruz*, 2005 WL 2000703, at *2 (applying *Kutzner* to bar § 1983 suit seeking notice of disposition of appellate decisions). Although this case specifically involves the question of relief in the form of access to physical evidence, any clarification that the Court provides, particularly as to the correct interpretation of *Heck*'s "necessarily implies" test, will, of course, usefully inform the inferior federal courts' exercise of § 1983 jurisdiction over other types of relief.

C. This Case Gives the Court an Opportunity to Ensure Uniform Treatment of Prisoners' Federal Claims.

This case also allows the Court to ensure that all prisoners, regardless of their geographic location, retain equal rights under federal law to seek redress for the state's denial of access to physical evidence. This Court has long defined justice as treating like cases in like fashion. *See, e.g., City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (stating that "equal protection of the laws . . . is essentially a direction that all persons similarly situated should be treated alike" (internal quotations marks and citation omitted)). Under the current legal landscape, prisoners' claims will receive vastly different treatment—dispositively so—depending on where they file their federal claims. With five circuits allowing § 1983 claims for DNA testing, two circuits rejecting them, and the remainder as yet undecided, prisoners within those jurisdictions allowing such civil rights claims have continued (and will continue) to file them, while other, similarly-situated prisoners in other jurisdictions will be forced to proceed via the much more restrictive requirements of habeas corpus, if such an option is even available.

The practical effect of the varied positions regarding *Heck*'s applicability to post-conviction DNA testing claims is that factually identical law suits filed in, for example, the Second Circuit and the Fifth Circuit respectively, will be treated completely different under the same federal law. This result cannot stand. A convicted person's ability to seek relief under federal law should not be so arbitrarily determined. Whatever rule the Court might ultimately adopt for processing such claims, granting certiorari will allow this Court to guarantee uniform treatment of federal claims raised by prisoners in different circuits, thus allowing the courts below to handle those claims more expeditiously.

IV. This Case Squarely Presents the Discrete but Important Issue of Whether *Heck* Bars a Prisoner's § 1983 Action Seeking Access to Evidence for DNA Testing.

In addition to resolving the specific conflict among the circuits as to the applicability of *Heck* to post-conviction claims seeking access to evidence under § 1983, this case provides the Court with a uniquely advantageous vehicle for deciding this issue, unencumbered by any other legal questions that would normally accompany these types of cases. The district court has already determined that Mr. Skinner's claims are not barred by the *Rooker-Feldman* doctrine or *res judicata*, *see* App. B at 2-5, determinations that were not appealed by Respondent. The claims, therefore, are not otherwise jurisdictionally barred or precluded from review. Nor is this Court being asked to wrestle with the merits of Mr. Skinner's underlying claims—on which he has a reasonable prospect of succeeding when reviewed carefully by the district court on remand—making this case in its present posture a simple and streamlined vehicle for resolving this important and recurring threshold legal issue.[11]

That is not to say, however, that this case is merely an academic exercise. This is a life-or-death case brought by a possibly innocent man whose guilt or innocence can be determined by DNA testing and whose circumstances fall within the window for § 1983 relief left open by *Osborne*. As explained *supra*, Mr. Skinner, unlike the petitioner in *Osborne*, has "use[d] the process provided to him by the State [and] attempted to vindicate the liberty interest that is now the centerpiece of his claim," *Osborne*, 129 S. Ct. at 2321, an omission on Osborne's part that weighed heavily in this Court's rejection of his procedural due process claim. As such, Mr. Skinner has made no "attempt to sidestep the process through a new federal lawsuit," *id.*, and, thus, cannot be similarly faulted. Therefore, Mr. Skinner's as-applied challenge to Texas's procedures may be accurately evaluated by the district court on remand "within the framework of the State's procedures for post-conviction relief." *Id.* at 2320.

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[11] The procedural posture of this case is much like that in *Nelson v. Campbell*, 541 U.S. 637 (2004), at the time the Court granted certiorari in that case. There, three days before his scheduled execution, Nelson filed a § 1983 claim in the district court alleging that Alabama's "cut down" procedure for gaining access to his veins violated the Eighth Amendment. As in this case, Nelson's claim was dismissed by the lower courts on *Heck* grounds. This Court issued a stay and granted certiorari to decide the important threshold questions of whether methods of execution could be challenged in a § 1983 action. *See id.* at 639-40. The Court ultimately answered that question in the affirmative, reversed, and remanded for consideration of the underlying issue of whether Alabama's procedures violated Nelson's constitutional rights. *Id.* at 646.

Consequently, granting review here will allow the Court to finish what it started when it agreed to hear *Osborne*, namely, to provide clear, unequivocal guidance to the lower courts regarding the applicability of *Heck* to prisoner claims for post-conviction DNA testing. Moreover, in addition to resolving the circuit split, a favorable decision will allow Mr. Skinner to pursue a claim that has a reasonable prospect of success but is otherwise foreclosed in the Fifth Circuit. Hence, the interests of justice weigh heavily in favor of granting certiorari in this case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari to review the judgment of the Fifth Circuit.

Respectfully submitted,

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Dated: February 12, 2010

APPENDIX A

Decision Below of the United States
Court of Appeals for the Fifth Circuit

Skinner v. Switzer, No. 10-70002,
2010 WL 338018 (5th Cir. Jan. 28, 2010)

HOnly the Westlaw citation is currently available.This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.⊔⊔ See also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4.⊓⊓(Find CTA5 Rule 28 and Find CTA5 Rule 47)

United States Court of Appeals,
Fifth Circuit.
Henry W. SKINNER, Plaintiff-Appellant,
v.
Lynn SWITZER, District Attorney for the 31st Judicial District of Texas, Defendant-Appellee.
No. 10-70002.

Jan. 28, 2010.

Robert Charles Owen, Esq, Owen & Rountree, L.L.P., Austin, TX, Douglas George Robinson, Skadden, Arps, Slate, Meagher & Flom, L.L.P ., Washington, DC, for Plaintiff-Appellant.

Mark D. White, Sprouse Shrader Smith, P.C., Amarillo, TX, for Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas, No. 2:09-CV-0281.

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM: [FN*]

> FN* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

*1 Henry Skinner, convicted of capital murder and sentenced to death, [FN2] appeals the dismissal of his complaint under 42 U.S.C. § 1983 in which he asserts that the defendant district attorney's refusal to allow him access to biological evidence for purposes of forensic DNA testing violates his Fourteenth Amendment right to due process and his Eighth Amendment right to be free from cruel and unusual punishment. The district court adopted the report and recommendation of the magistrate judge and granted defendant's motion to dismiss.

> FN2. *See* *Skinner v. Quarterman,* 576 F.3d 214 (5th Cir.2009), *petition for cert. filed* (Nov. 23, 2009) (No. 09-7784).

Execution is set for February 24, 2010. Skinner moves to expedite the appeal and proposes an expedited briefing schedule to which the defendant does not object. In his motion, Skinner acknowledges that the law of this circuit is contrary to the position taken in his complaint; he refers specifically to the binding authority of *Kutzner v. Montgomery County,* 303 F.3d 339 (5th Cir.2002), and to the unpublished but persuasive opinion in *Richards v. District Attorney's Office,* No. 09-10144, 2009 U.S.App. LEXIS 26947 (5th Cir. Dec. 10, 2009) (per curiam) (unpublished). In both of those cases, this court held that an action by a prisoner for post-conviction DNA testing is not cognizable under § 1983 and must instead be brought as a petition for writ of habeas corpus.

Skinner suggests that, as an alternative to receiving full briefing on an expedited basis, this court can dispose of the appeal on the basis of *Kutzner* and *Richards.* This would allow Skinner to seek relief expeditiously in the Supreme Court in light of the scheduled execution.

We agree with that suggestion. The judgment is AFFIRMED. The motion to expedite the appeal is DENIED as unnecessary. The mandate shall issue forthwith.

C.A.5 (Tex.),2010.
Skinner v. Switzer
Slip Copy, 2010 WL 338018 (C.A.5 (Tex.))

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APPENDIX B

Decision Below of the United States
District Court for the Northern District
of Texas (Including Magistrate Judge's
Report and Recommendation)

Skinner v. Switzer, No. 2:09-CV-0281,
2010 WL 273143 (N.D. Tex. Jan. 20, 2010)

HOnly the Westlaw citation is currently available.

United States District Court,
N.D. Texas,
Amarillo Division.
Henry Watkins SKINNER, Plaintiff,
v.
Lynn SWITZER, District Attorney, 31st Judicial
District of Texas, Defendant.
No. 2:09-CV-0281.

Jan. 20, 2010.

Robert C. Owen, Owen & Rountree, Austin, TX, Douglas Robinson, Skadden Arps Slate Meagher & Flom, Washington, DC, Maria Cruz Melendez, Skadden Arps Slate Meagher & Flom LLP, New York, NY, for Plaintiff.

Mark D. White, Sprouse Shrader Smith, Amarillo, TX, Lynn Switzer, Pampa, TX, for Defendant.

ORDER OVERRULING OBJECTIONS, ADOPTING REPORT AND RECOMMENDATION, GRANTING DEFENDANT'S MOTION TO DISMISS, and DISMISSING § 1983 COMPLAINT

MARY LOU ROBINSON, District Judge.

*1 Plaintiff HENRY WATKINS SKINNER has filed with this Court a cause of action under Title 42 U.S.C. § 1983. On January 15, 2010, the United States Magistrate Judge issued a Report and Recommendation in this cause, recommending therein that defendant's motion to dismiss be granted and plaintiff's complaint be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and *Kutzner v. Montgomery County,* 303 F.3d 339 (5th Cir.2002). The same day the Report and Recommendation was issued, plaintiff filed objections to it, admitting that while the *Kutzner* and its progeny are binding upon this Court, the caselaw is incorrect in light of Supreme Court precedent. Plaintiff represents he intends to make no further objections before the expiration of the fourteen-day objection deadline.

The undersigned United States District Judge has made an independent examination of the record in this case and has considered the objections made by petitioner to the Report and Recommendation. The objections filed by petitioner are without merit and are hereby OVERRULED. The Magistrate Judge's Report and Recommendation is hereby ADOPTED. Defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is GRANTED, and the § 1983 complaint is DISMISSED.

IT IS SO ORDERED.

REPORT AND RECOMMENDATION TO GRANT DEFENDANT'S MOTION TO DISMISS AND TO DISMISS § 1983 COMPLAINT

CLINTON E. AVERITTE, United States Magistrate Judge.

Before the Court is plaintiff's complaint, alleging a cause of action under Title 42 U.S.C. § 1983 and asserting that defendant's refusal to allow him access to biological evidence for purposes of forensic DNA testing violates his Fourteenth Amendment right to due process and his Eighth Amendment right to be free from cruel and unusual punishment. For the reasons set forth, the undersigned recommends to the United States District Judge that defendant's motion to dismiss be GRANTED and that plaintiff's complaint be DISMISSED.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, defendant, and the Court of Criminal Appeals have adequately set forth the procedural background of this case. *See Skinner v. State,* 956 S.W.2d 532 (Tex.Crim.App.1997); (*Complaint,* document # 1, cause 2:09-CV-281, filed by plaintiff on Nov. 27, 2009; *Motion to Dismiss,* document # 28, cause 2:09-CV-281, filed by defendant on Dec. 29, 2009). For the purposes of these findings, conclusions, and recommendation, however, the following summation is provided.

Plaintiff Henry Skinner was convicted in the 31st District Court of Gray County, Texas, of the offense of capital murder as a result of his having committed multiple murders during one criminal episode. The jury sentenced plaintiff to death. He is currently scheduled to be executed by the State of Texas on February 24, 2010.

Because of procedural issues not relevant to this 7 1983 proceeding, the merits of Skinner's state habeas claims were never addressed during state habeas corpus proceedings. Skinner did present claims in a federal habeas corpus action filed in this Court, which resulted in a determination that his conviction and death sentence were constitutional and federal habeas corpus relief was denied. *See Skinner v. Dretke*, cause 2:99-CV-45 (judgment issued Feb. 22, 2007). The Fifth Circuit Court of Appeals affirmed this Court's denial of federal habeas corpus relief. *See Skinner v. Quarterman*, 576 F.3d 214 (5th Cir.2009). Plaintiff filed a petition for a writ of certiorari in the case on November 23, 2009, which is pending before the Supreme Court.

*2 By this lawsuit, plaintiff seeks, for purposes of conducting DNA testing, access to biological evidence recovered from the scene of the murders and never before tested. Although the evidence has not been previously tested, it is not newly discovered evidence, but was available to plaintiff at the time of trial. Plaintiff does not contend the results of any DNA testing would in fact be exculpatory, but contends the results might be exculpatory. In seeking this evidence post-conviction, plaintiff filed two motions in Texas courts, in 2001 and in 2007, for DNA evidence pursuant to Article 64.01 of the Texas Code of Criminal Procedure. The state trial court denied both of those motions, and the Texas Court of Criminal Appeals (CCA) affirmed both denials. *See Skinner v. State*, 293 S.W.3d 196 (Tex.Crim.App.2009); *Skinner v. State*, 122 S.W.3d 808 (Tex.Crim.App.2003). Plaintiff did not seek relief from either of the CCA's denials of the Article 64.01 motions by petitioning the United States Supreme Court for a writ of certiorari.

II.

THE ALLEGATIONS

By his complaint, plaintiff asks the Court to require defendant to release certain items of biological evidence for DNA testing. Plaintiff alleges he is entitled to obtain certain biological evidence, which he lists with specificity, for DNA testing and that the withholding of the evidence violates his due process rights under the Fourteenth Amendment and his right to be free from cruel and unusual punishment under the Eighth Amendment to the United State Constitution. Less than one month after filing his complaint and motion for preliminary injunction, plaintiff filed a Notice of Recent Relevant Authority, in which he acknowledged relevant Fifth Circuit caselaw that appears to require this Court to dismiss plaintiff's complaint for failing to raise a cognizable 7 1983 claim. (*Plaintiff's Notice of Recent Relevant Authority*, document # 23, cause 2:09-CV-281, filed by plaintiff on December 22, 2009). By his Notice, plaintiff suggests the Court dismiss the case pursuant to the screening provisions of the Prison Litigation Reform Act.

In response to the complaint, defendant has filed a motion to dismiss, urging four grounds for dismissal:

1. The Court lacks subject matter jurisdiction under the *Rooker-Feldman* doctrine to rule on plaintiff's claims and should therefore dismiss the complaint under rule 12(b)(1) of the Federal Rules of Civil Procedure;

2. The Court is bound by *Heck v. Humphrey*, 512 U.S. 475, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) as interpreted in *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir.2002) and should therefore dismiss the complaint under rule 12(b)(6) of the Federal Rules of Civil Procedure;

3. Plaintiff's complaint presents claims that are essentially identical to several prior claims decided against plaintiff at the state and federal levels and should therefore be dismissed pursuant to 28 U.S.C. 7 1738; and

4. The complaint is in essence an improper, successive petition for habeas corpus relief and should therefore be dismissed pursuant to 28 U.S.C. 7 2244(b)(3-4).

III.

JURISDICTION

*3 Notwithstanding plaintiff's notice of Recent Relevant Authority, this Court must, prior to discussing the merits of the case, determine if it has jurisdiction. *Lance v. Coffman*, 549 U.S. 437, 438, 127 S.Ct. 1194, 1196, 167 L.Ed.2d 29 (2007). Defendant contends the *Rooker-Feldman* doctrine precludes this Court from obtaining jurisdiction over this case. That doctrine bars federal district courts from exercising "appellate jurisdiction over state-court judgments, which Congress has reserved to [the Supreme] Court." *Verizon Md., Inc. v. Pub. Serv. Com'n of Md.*, 535 U.S. 635, 644 n. 3, 122 S.Ct. 1753, 1759, 152 L.Ed.2d 871 (2002). The Court clarified the scope of the doctrine in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). In that case, the Court established "[t]he *Rooker-Feldman* doctrine ... is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 284, 125 S.Ct. at 1521-22.

Research has not uncovered any Fifth Circuit guidance directly on point. The Second Circuit, however, has discussed *Rooker-Feldman* in the context of a case where a prisoner sought access to DNA evidence via a § 1983 claim. *See McKithen v. Brown* 481 F.3d 89 (2d Cir.2007). In that case, the court, relying on *Exxon*, determined the state-court decision denying plaintiff access to DNA evidence did not *cause* injury to constitutional rights. *Id.* at 98. Rather, the injury existed before the state court entered its judgment and was "simply ratified, acquiesced in, or left unpunished by the state court." *Id.* (internal quotation omitted).

The Sixth Circuit, however, in evaluating a factually similar situation, reached a different conclusion. In *In re Smith*, an unpublished decision, the court, likewise relying on *Exxon*, held a § 1983 plaintiff was barred by the *Rooker-Feldman* doctrine from seeking DNA evidence. No. 07-1220, 2009 WL 3049202 at * 3 (6th Cir. Sept.24, 2009). The plaintiff in *In re Smith* complained the *state trial court* incorrectly denied his motions for access to DNA evidence. *Id.* The Sixth Circuit concluded this was a complaint of an injury caused by the state-court judgment and which sought review and rejection of that judgment, and, as such, was barred by *Rooker-Feldman*. *Id.*

Plaintiff's claims for relief are limited to those asserted in his complaint and the only causes of action asserted in his complaint are that defendant Switzer violated his Fourteenth and Eighth Amendment rights. The issue is made more difficult, however, because it is not clear from plaintiff's pleadings whether he is attempting to assert other claims. It may be that plaintiff is attempting to assert at least two different theories of relief: (1) that defendant's actions violated his constitutional rights (as contained in his complaint) and (2) that the state court's actions in applying the state DNA testing statute violated his constitutional rights (not asserted in his complaint). The first of these claims is similar to those in *McKithen*, while the second is more similar to those in *In re Smith*. As such, the first of these claims is not barred by the *Rooker-Feldman* doctrine, but the second, if in fact it is being asserted, very well may be barred.

A. Issues Not Precluded by the Rooker-Feldman Doctrine

*4 "A claim which is not raised in the complaint ... is not properly before the court." *Cutrera v. Bd. of Supervisors*, 429 F.3d 108, 113 (5th Cir.2005). Thus, the Court's analysis must begin with and is determined by the particular causes of action plaintiff brings in his complaint. In his complaint, plaintiff identified two causes of action, *i.e.*, that defendant deprived plaintiff of (1) his right to due process of law under the Fourteenth Amendment and (2) his right to be free from cruel and unusual punishment under the Eighth Amendment. (*Complaint*, document # 1, ¶ ¶ 33, 35, cause 2:09-CV-281, filed by plaintiff on Nov. 27, 2009). Critically, plaintiff's *complaint* does not challenge the constitutionality of Article 64 of the Texas Code of Criminal Procedure nor does it ask this Court to review the application of Article 64 by the CCA's judgments denying him access to the DNA evidence. While plaintiff does, in various other pleadings, complain about the decisions of the CCA, he has not set out a specific cause of action challenging those decisions, as discussed in detail *infra.*[FN1]

[FN1] In fact, plaintiff, at page 3 of plaintiff's response to defendant's motion to dismiss, he affirmatively states that he does not complain of injuries caused by any state court judgment. (*Plaintif's Response to Defendant's Motion to Dismiss*, pg. 3, document # 37, cause 2:09-CV-281, filed by plaintiff on January 6, 2010). At page 4, plaintiff against

> reiterates that the injury of which he complains, that is, the refusal of the defendant district attorney to provide access to DNA evidence, existed prior to the state court proceedings and, therefore, his injury could not have been caused by those proceedings. (*Id.*, pg. 4). At page 6 of his response, plaintiff states that he "in no way" requests this Court to review or reject any state court judgments and further states that whether the state court judgments are valid or invalid, his constitutionally protected rights were violated by defendant's refusal to provide access to the requested evidence. (*Id.*, pg. 6).

Any injuries caused by defendant's refusal to release DNA evidence predate and are not caused by the CCA's decisions to not grant plaintiff access to the biological evidence. As in the *McKithen* case, the state-court decision denying plaintiff access to the evidence did not, in fact, *cause* the injury of which plaintiff initially complains. *See* McKithen, 481 F.3d at 98. Moreover, plaintiff affirmatively disclaims he is claiming any injury caused by the state court judgment. (*See* plaintiff's response to defendant's motion to dismiss). Because plaintiff is not "complaining of injuries caused by [the] state-court judgment[ ]" and does not seek review of those judgments, review of the claims for relief set out in the complaint is not barred by *Rooker-Feldman. See* Exxon Mobil Corp., 544 U.S. at 284, 125 S.Ct. at 1521-22.

B. Issues Likely Precluded by the Rooker-Feldman Doctrine

Ordinarily, the Court would not address claims which the plaintiff has not properly pled. As set forth above, the undersigned finds plaintiff to only have alleged those causes of action set out at paragraphs VII and VIII of his complaint. Since these findings, conclusions, and recommendations will be subject to review by the District Judge, the undersigned has included a review of the additional arguments plaintiff has set out in his pleadings even though such claims were not identified as specific claims for relief. The reasoning in *In re Smith* would seem to apply to the arguments plaintiff makes that the state court's actions in applying the state DNA testing statute violated his constitutional rights. In his Response to Defendant's Motion to Dismiss, plaintiff contends Article 64 of the Texas Code of Criminal Procedure is unconstitutional *as applied* to his case. (*Plaintiff's Response to Defendant's Motion to Dismiss*, pgs. 9, 13, document # 37, cause 2:09-CV-281, filed by plaintiff on January 6, 2010). These allegations appear to directly challenge the state court action, and by making them, plaintiff includes an argument that the *Texas Court of Criminal Appeals* violated his due process rights by incorrectly applying the state statute. By directly pointing to a state court's actions as a source of injury, and by asking the Court to review such state court actions, plaintiff raises claims likely barred by *Rooker-Feldman. See* Exxon Mobil Corp., 544 U.S. at 284, 125 S.Ct. at 1521-22. If the CCA did indeed incorrectly and unconstitutionally apply Article 64 of the Texas Code of Criminal Procedure, the proper relief for plaintiff would have been to appeal the judgment directly to the United States Supreme Court.

*5 Those claims, however, are not further addressed because plaintiff has not raised them as a claim for relief and has not sought to amend his complaint to assert them. For purposes of this Report and Recommendation, the undersigned finds no such claims to be asserted. *See Cutrera*, 426 F.3d at 113.

The undersigned also finds that paragraph 31 of the complaint, in which plaintiff states "[a]s a result of the decisions of the CCA denying Plaintiff post-conviction DNA testing under Art. 64, the Defendant has refused and continues to refuse to make available to Plaintiff any DNA material for testing," not to state an additional cause of action or claim for relief. (*Complaint*, document # 1, ¶ 31, cause 2:09-CV-281, filed by plaintiff on Nov. 27, 2009). The Court notes this paragraph is not under the paragraphs plaintiff identifies in his complaint as claims for relief. (Paragraphs VII and VIII). Moreover, paragraph 31 appears merely to be a chronological statement that defendant has continually refused to release this evidence both before and following the CCA's denial of plaintiff's Article 64 motions. To the extent plaintiff contends otherwise, the Court does not believe this singular, vague statement can properly be read as directly challenging the CCA's decisions because if it were so read, plaintiff would be taking mutually exclusive positions, i.e. as set forth in footnote 1, plaintiff, in response to the motion to dismiss, affirmatively states the injury of which he complains existed prior to any state court decision and that he does not complain of injuries caused by a state court judgment.

Consequently, if the undersigned is correct in the determination of the claims presented, no *Rooker-Feldman* bar is present. If, however, the undersigned is incorrect and plaintiff is asserting any additional claims that the application of Article 64 by the CCA deprived him of due process, then it would appear he is complaining of an injury caused by the state court judgment and defendant's motion to dismiss based upon the *Rooker-Feldman* doctrine has considerable merit and the issue would have to be revisited. At this stage, plaintiff has not formally asserted these other claims in his complaint as causes of action and the Court will not further address plaintiff's contention regarding the improper application of Article 64 by the Texas courts.

IV.

Application of Kutzner

Defendant next contends plaintiff fails to state a claim upon which relief may be granted. Citing the *Kutzner* decision, issued by the Fifth Circuit in 2002, defendant contends plaintiff's claims are not cognizable under § 1983 and must be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Plaintiff agrees the *Kutzner* decision is binding upon this Court. (*Plaintiff's Notice of Recent Relevant Authority*, document # 23, cause 2:09-CV-281, filed by plaintiff on December 22, 2009).

In *Heck v. Humphrey*, the Supreme Court emphasized that a petition for a writ of habeas corpus is the exclusive remedy for a state prisoner challenging the fact or duration of his confinement. 512 U.S. 481, 114 S.Ct. at 2369, 129 L.Ed.2d 383. In evaluating § 1983 suits, the Court instructed district courts to "consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; it if would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 487, 114 S.Ct. at 2372.

*6 Thereafter, the Fifth Circuit evaluated a § 1983 claim seeking to compel the production of biological evidence for DNA testing. *See Kutzner*, 303 F.3d at 340. In that case, the plaintiff contended that state officials refused to release biological evidence for DNA testing and thereby prevented him "from gaining access to exculpatory evidence which could exclude him as a perpetrator" of the offense for which he was convicted. *Id.* at 340. Applying *Heck*, the court held such a claim was not cognizable in a § 1983 action. Rather, the court pointed to 28 U.S.C. § 2254 as the proper statute for bringing such a claim:

> claims seeking to attack the fact or duration of confinement, as well as claims which are "so intertwined" with attacks on confinement that their success would "necessarily imply" revocation or modification of confinement, must be brought as habeas corpus petitions and not under § 1983. *Martinez v. Texas Court of Criminal Appeals*, 292 F.3d 417, 423 (5th Cir.2002). Under *Martinez*, a prisoner's request for DNA testing of evidence relevant to his prior conviction is "so intertwined" with the merits of the conviction as to require habeas corpus treatment.

Id. at 341.

Three years after the *Kutzner* opinion, the Supreme Court issued *Wilkinson v. Dotson*, 544 U.S. 74, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005). In that case, the Court evaluated its caselaw regarding the difference between claims cognizable under § 1983 and claims cognizable in habeas corpus.

The *Dotson* court found the § 1983 action, involving parole proceedings, should be allowed to proceed as a § 1983 action. *See id.* Although *Dotson* did not involve a request for evidence for DNA testing, circuit court of appeals have interpreted the language in *Dotson* to allow a prisoner to bring a claim for biological evidence for DNA testing as a § 1983 claim, as opposed to the Fifth Circuit's approach requiring a prisoner to bring such a claim as a habeas corpus petition. *See McKithen v. Brown*, 481 F.3d 89, 103 (2d Cir.2007) (holding "even if success for the plaintiff might well make it *more likely* that the plaintiff, in a subsequent proceeding, may eventually be able to make a showing that his conviction was unlawful and even if a plaintiff's ultimate motive is to challenge his conviction[,] a post-conviction claim for access to evidence is cognizable under § 1983" (internal citations omitted)); *Savory v. Lyons*, 469 F.3d 667 (7th Cir.2006); *Osborne v. District Attorney's Office*, 423 F.3d 1050 (9th Cir.2005), *rev'd on other grounds*, ---

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U.S. ----, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009). Additionally, the Eleventh Circuit's position, established before *Dotson* was issued, is in agreement with that taken by the Second, Seventh, and Ninth Circuits. *See Bradley v. Pryor*, 305 F.3d 1287, 1292 (11th Cir.2002) (holding a request for post-conviction DNA evidence may be brought under § 1983 because if a prisoner were successful in such a suit, "the conviction and sentence will not be called into question, since the only thing [the prisoner] will have secured is access to evidence").[FN2]

*7 The Fifth Circuit has not ever discussed the *Dotson* decision in the context of its application to post-conviction requests for DNA evidence. It has, however, cited the *Kutzner* case after *Dotson* was decided in a case involving a post-conviction request for DNA evidence-indicating *Kutzner* remains the law in this circuit. *See Richards v. District Attorney's Office*, No. 09-10144, 2009 WL 4716025 at *2 (5th Cir. Dec.10, 2009). Even were this Court to question the validity of *Kutzner* after *Dotson*, it recognizes that only the Fifth Circuit may overrule its own law, and even though there is an intervening Supreme Court decision in this case, there is also a latter Fifth Circuit decision. *See United States v. Short*, 181 F.3d 620, 623-24 (5th Cir.1999) (noting that panels on the Fifth Circuit are bound by the precedent of previous panels).

Based upon the foregoing, there is no reason not to apply *Kutzner*. In considering whether *Kutzner* applies, the undersigned notes that the Supreme Court expressly left the *Heck* issue open when it decided *Osborne*, --U.S. ----, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009). In fact, the Supreme Court, while acknowledging that the Courts of Appeals had applied *Dotson* to allow § 1983 DNA lawsuits, specifically declined to address the issue of *Heck v. Humphrey*. It now appears the Fifth Circuit will address the viability of *Kutzner* in light of *Dotson* and *Osborne*. (*See Plaintif's Notice of Recent Relevant Authority*, document # 23, cause 2:09-CV-281, filed by plaintiff on December 22, 2009).

This Court must follow the law established in *Kutzner* and hold that plaintiff Skinner's § 1983 claims are cognizable only in habeas corpus. *See Kutzner*, 303 F.3d at 341. As such, plaintiff fails to state a claim in his § 1983 complaint upon which relief may be granted and his complaint should be dismissed on such grounds.[FN3] Because the Court recommends the dismissal of the case for failure to state a claim upon which relief may be granted, it foregoes further discussion of other grounds for dismissal at this time.

Although the Court declines further discussion of other grounds for dismissal urged by the defendant, there are two issues which the undersigned identifies in the event the District Judge finds them to be cognizable. First, there is no freestanding substantive due process right to DNA evidence. *Osborne*, 129 S.Ct. at 2322-23. Were the District Judge to find *Kutzner* did not bar this lawsuit, then that issue would be presented as to any consideration of the merits.

Second, defendant's *res judicata* arguments have not

FN2. In her Reply Brief in support of her motion to dismiss, defendant contends other courts appear to have sided, post-*Dotson*, with the Fifth Circuit's position in *Kutzner*. The cases cited by defendant, however, fail to discuss how post-conviction requests for DNA evidence should be brought (under 42 U.S.C. § 1983 or 28 U.S.C. § 2254), which is the issue at the heart of *Kutzner*. *See Young v. Philadelphia County Dist. Attorney's Office*, no. 09-1668, 2009 WL 2445084 (3d Cir. Aug.11, 2009) ("[Plaintiff] notes the circuit split over whether requests for post-conviction DNA testing are properly brought under § 1983 or in habeas proceedings. We have not yet answered this question, nor need we do so today."); *McDaniel v. Suthers*, No. 08-1400, 2009 WL 1784000 (10th Cir. June 24, 2009) (discussing the merits of a post-conviction request for DNA evidence brought in a § 1983 suit).

FN3. Plaintiff contends the Court should dismiss this case under 28 U.S.C. § 1915A, which requires a court to dismiss a case if, upon initial screening, the case fails to state a claim upon which relief may be granted. This case, however, in which defendant has filed responsive pleadings, plaintiff has answered such pleadings, and defendant has filed responses to plaintiff's answer, is clearly far beyond the screening stage, making § 1915A no longer applicable.

been addressed. If the undersigned is correct in the determination that plaintiff's claims are limited to those identified in his complaint, then neither *res judicata* nor *Rooker-Feldman* bar the consideration of the case. If, however, plaintiff is in fact asserting the additional claims as discussed in section III of this Report and Recommendation, *res judicata* would be an issue.

V.

RECOMMENDATION

*8 It is the RECOMMENDATION of the United States Magistrate Judge to the United States District Judge that the 42 U.S.C. § 1983 filed by plaintiff HENRY WATKINS SKINNER be DISMISSED for failure to state a claim upon which relief may be granted and that the motion to dismiss filed by defendant LYNN SWITZER be GRANTED.

VI.

INSTRUCTIONS FOR SERVICE

The United States District Clerk is directed to send a copy of this Report and Recommendation to each party by the most efficient means available.

IT IS SO RECOMMENDED.

ENTERED this 15th day of January, 2010.

N.D.Tex.,2010.
Skinner v. Switzer
Slip Copy, 2010 WL 273143 (N.D.Tex.)

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APPENDIX C

Federal Habeas Corpus Statutes

28 U.S.C. §§ 2241-2255

CHAPTER 153—HABEAS CORPUS

Sec.
2241. Power to grant writ.
2242. Application.
2243. Issuance of writ; return; hearing; decision.
2244. Finality of determination.
2245. Certificate of trial judge admissible in evidence.
2246. Evidence; depositions; affidavits.
2247. Documentary evidence.
2248. Return or answer; conclusiveness.
2249. Certified copies of indictment, plea and judgment; duty of respondent.
2250. Indigent petitioner entitled to documents without cost.
2251. Stay of State court proceedings.
2252. Notice.
2253. Appeal.
2254. State custody; remedies in Federal courts.
2255. Federal custody; remedies on motion attacking sentence.
[2256. Omitted.]

HISTORICAL AND STATUTORY NOTES

Codifications

The table of sections for chapter 153 was amended by Pub.L. 95–598, Title II, § 250(b), Nov. 6, 1978, 92 Stat. 2672, effective June 28, 1984, pursuant to Pub.L. 95–598, Title IV, § 402(b), Nov. 6, 1978, 92 Stat. 2682, as amended by Pub.L. 98–249, § 1(a), Mar. 31, 1984, 98 Stat. 116; Pub.L. 98–271, § 1(a), Apr. 30, 1984, 98 Stat. 163; Pub.L. 98–299, § 1(a), May 25, 1984, 98 Stat. 214; Pub.L. 98–325, § 1(a), June 20, 1984, 98 Stat. 268, set out as an Effective and Applicability Provisions note preceding section 101 of Title 11, Bankruptcy, by adding:

"2256. Habeas corpus from bankruptcy courts.".

Section 402(b) of Pub.L. 95–598 was amended by section 113 of Pub.L. 98–353, Title I, July 10, 1984, 98 Stat. 343, by substituting "shall not be effective" for "shall take effect on June 28, 1984", thereby eliminating the amendment by section 250(b) of Pub.L. 95–598, effective June 27, 1984, pursuant to section 122(c) of Pub.L. 98–353, set out as an Effective and Applicability Provisions note under section 151 of this title.

Section 121(a) of Pub.L. 98–353 directed that section 402(b) of Pub.L. 95–598 be amended by substituting "the date of enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984 [i.e. July 10, 1984]" for "June 28, 1984". This amendment was not executed in view of the prior amendment to section 402(b) of Pub.L. 95–598 by section 113 of Pub.L. 98–353.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed [illegible] the commission, order or sanction of any f[illegible] state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 112, 63 Stat. 105; Sept. 19, 1966, Pub.L. 89–590, 80 Stat. 811; Dec. 30, 2005, Pub.L. 109–148, Div. A, Title X, § 1005(e)(1), 119 Stat. 2741; Jan. 6, 2006, Pub.L. 109–163, Div. A, Title XIV, § 1405(e)(1), 119 Stat. 3477; Oct. 17, 2006, Pub.L. 109–366, § 7(a), 120 Stat. 2635; Jan. 28, 2008, Pub.L. 110–181, Div. A, Title X, § 1063(f), 122 Stat. 323.)

HISTORICAL AND STATUTORY NOTES

References in Text

Section 1005(e) of the Detainee Treatment Act of 2005, referred to in subsec. (e)(2), probably means Pub.L. 109–148, Div. A, Title X, § 1005, Dec. 30, 2005, 119 Stat. 2740, which is set out in a note under 10 U.S.C.A. § 801 note. Pub.L. 109–163, Div. A, Title XIV, Jan. 6, 2006, 119 Stat. 3474, also enacted a "Detainee Treatment Act of 2005", see Short Title note under 42 U.S.C.A. § 2000dd and Tables, but that Act contains no section 1005(e).

[illegible]ective and Applicability Provisions

2006 Acts. Pub.L. 109–366, § 7(b), Oct. 17, 2006, 120 Stat. 2635, provided that: "The amendment made by subsection (a) [amending this section] shall take effect on the date of the enactment of this Act [Oct. 17, 2006], and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001."

Treaty Obligations not Establishing Grounds for Certain Claims

Pub.L. 109–366, § 5, Oct. 17, 2006, 120 Stat. 2631, provided that:

"(a) **In general.**—No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

"(b) **Geneva conventions defined.**—In this section, the term 'Geneva Conventions' means—

"(1) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva August 12, 1949 (6 UST 3114);

"(2) the Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217);

"(3) the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316); and

"(4) the Convention Relative to the Protection of Civilian Persons in Time of War, done at Geneva August 12, 1949 (6 UST 3516)."

§ 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

(June 25, 1948, c. 646, 62 Stat. 965.)

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

(June 25, 1948, c. 646, 62 Stat. 965.)

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

(June 25, 1948, c. 646, 62 Stat. 965; Nov. 2, 1966, Pub.L. 89-711, § 1, 80 Stat. 1104; Apr. 24, 1996, Pub.L. 104-132, Title I, §§ 101, 106, 110 Stat. 1217, 1220.)

§ 2245. Certificate of trial judge admissible in evidence

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

(June 25, 1948, c. 646, 62 Stat. 966.)

§ 2246. Evidence; depositions; affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

(June 25, 1948, c. 646, 62 Stat. 966.)

§ 2247. Documentary evidence

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

(June 25, 1948, c. 646, 62 Stat. 966.)

§ 2248. Return or answer; conclusiveness

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

(June 25, 1948, c. 646, 62 Stat. 966.)

§ 2249. Certified copies of indictment, plea and judgment; duty of respondent

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

(June 25, 1948, c. 646, 62 Stat. 966.)

§ 2250. Indigent petitioner entitled to documents without cost

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

(June 25, 1948, c. 646, 62 Stat. 966.)

§ 2251. Stay of State court proceedings

(a) In general.—

(1) **Pending matters.**—A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

(2) **Matter not pending.**—For purposes of this section, a habeas corpus proceeding is not pending until the application is filed.

(3) **Application for appointment of counsel.**—If a State prisoner sentenced to death applies for

appointment of counsel pursuant to section 3599(a)(2) of title 18 in a court that would have jurisdiction to entertain a habeas corpus application regarding that sentence, that court may stay execution of the sentence of death, but such stay shall terminate not later than 90 days after counsel is appointed or the application for appointment of counsel is withdrawn or denied.

(b) **No further proceedings.**—After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

(June 25, 1948, c. 646, 62 Stat. 966; Mar. 9, 2006, Pub.L. 109–177, Title V, § 507(f), 120 Stat. 251.)

HISTORICAL AND STATUTORY NOTES

Application to Pending Cases

Pub.L. 109-177, Title V, § 507(d), Mar. 9, 2006, 120 Stat. 251, provided that:

"(1) **In general.**—This section and the amendments made by this section [enacting 28 U.S.C.A. § 2265, amending 28 U.S.C.A. §§ 2251, 2261, and 2266, and repealing 28 U.S.C.A. § 2265] shall apply to cases pending on or after the date of enactment of this Act [Mar. 9, 2006].

"(2) **Time limits.**—In a case pending on the date of enactment of this Act [Mar. 9, 2006], if the amendments made by this section [enacting 28 U.S.C.A. § 2265, amending 28 U.S.C.A. §§ 2251, 2261, and 2266, and repealing 28 U.S.C.A. § 2265] establish a time limit for taking certain action, the period of which began on the date of an event that occurred prior to the date of enactment of this Act [Mar. 9, 2006], the period of such time limit shall instead begin on the date of enactment of this Act [Mar. 9, 2006]."

§ 2252. Notice

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct.

(June 25, 1948, c. 646, 62 Stat. 967.)

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

(June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 113, 63 Stat. 105; Oct. 31, 1951, c. 655, § 52, 65 Stat. 727; Apr. 24, 1996, Pub.L. 104–132, Title I, § 102, 110 Stat. 1217.)

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

(June 25, 1948, c. 646, 62 Stat. 967; Nov. 2, 1966, Pub.L. 89–711, § 2, 80 Stat. 1105; Apr. 24, 1996, Pub.L. 104–132, Title I, § 104, 110 Stat. 1218.)

HISTORICAL AND STATUTORY NOTES

Senate Revision Amendments

Senate amendment to this section, Senate Report No. 1559, amendment No. 47, has three declared purposes, set forth as follows:

"The first is to eliminate from the prohibition of the section applications in behalf of prisoners in custody under authority of a State officer but whose custody has not been directed by the judgment of a State court. If the section were applied to applications by persons detained solely under authority of a State officer it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty.

"The second purpose is to eliminate, as a ground of Federal jurisdiction to review by habeas corpus judgments of State courts, the proposition that the State court has denied a prisoner a 'fair adjudication of the legality of his detention under the Constitution and laws of the United States.' The Judicial Conference believes that this would be an undesirable ground for Federal jurisdiction in addition to exhaustion of State remedies or lack of adequate remedy in the State courts because it would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petitioner to assert in the Federal court after he had exhausted his State remedies or if he had no adequate State remedy.

"The third purpose is to substitute detailed and specific language for the phrase 'no adequate remedy available.' That phrase is not sufficiently specific and precise, and its meaning should, therefore, be spelled out in more detail in the section as is done by the amendment."

1966 Acts. Senate Report No. 1797, see 1966 U.S. Code Cong. and Adm. News, p. 3663.

References in Text

Section 408 of the Controlled Substances Act, referred to in subsec. (h), is classified to section 848 of Title 21, Food and Drugs.

Approval and Effective Date of Rules Governing Section 2254 Cases and Section 2255 Proceedings for United States District Courts

Pub.L. 94–426, § 1, Sept. 28, 1976, 90 Stat. 1334, provided: "That the rules governing section 2254 cases in the United

States district courts and the rules governing section 2255 proceedings for the United States district courts, as proposed by the United States Supreme Court, which were delayed by the Act entitled 'An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court' (Public Law 94-349), are approved with the amendments set forth in section 2 of this Act and shall take effect as so amended, with respect to petitions under section 2254 and motions under section 2255 of title 28 of the United States Code filed on or after February 1, 1977."

Postponement of Effective Date of Proposed Rules Governing Proceedings Under Sections 2254 and 2255 of this Title

Rules and forms governing proceedings under sections 2254 and 2255 of this title proposed by Supreme Court order of Apr. 26, 1976, effective 30 days after adjournment sine die of 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier, see section 2 of Pub.L. 94-349, set out as a note under section 2074 of this title.

CROSS REFERENCES

Rules Governing Section 2254 Cases in the United States District Courts are set out ante, following the Rules of Procedure of the Judicial Panel on Multidistrict Litigation.

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

(June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105; Apr. 24, 1996, Pub.L. 104-132, Title I, § 105, 110 Stat. 1220; Jan. 7, 2008, Pub.L. 110-177, Title V, § 511, 121 Stat. 2545.)

HISTORICAL AND STATUTORY NOTES

References in Text

Section 408 of the Controlled Substances Act, referred to in text, is classified to section 848 of Title 21, Food and Drugs.

Approval and Effective Date of Rules Governing Section 2254 Cases and Section 2255 Proceedings For United States District Courts

Pub.L. 94-426, § 1, Sept. 28, 1976, 90 Stat. 1334, provided: "That the rules governing section 2254 cases in the United States district courts and the rules governing section 2255 proceedings for the United States district courts, as proposed by the United States Supreme Court, which were delayed by the Act entitled 'An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court' (Public Law 94-349), are approved with the amendments set forth in section 2 of this Act and shall take effect as so amended, with respect to petitions under section 2254 and motions [sections 2254 and 2255 of this title] under section 2255 of title 28 of the United States Code filed on or after February 1, 1977."

Postponement of Effective Date of Proposed Rules and Forms Governing Proceedings Under Sections 2254 and 2255 of this Title

Rules and forms governing proceedings under this section and section 2254 of this title proposed by Supreme Court order of Apr. 26, 1976, effective 30 days after adjournment sine die of 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier, see section 2 of Pub.L. 94-349, set out as a note under section 2074 of this title.

CROSS REFERENCES

Rules Governing Section 2255 Proceedings in the United States District Courts are set out ante, following the Rules Governing Section 2254 Cases in the United States District Courts.

[§ 2256. Omitted]

HISTORICAL AND STATUTORY NOTES

Codifications

This section as added by Pub. L. 95-598, Title II, § 250(a), Nov. 6, 1978, 92 Stat. 2672, effective June 28, 1984, pursuant to Pub. L. 95-598, Title IV, § 402(b), Nov. 6, 1978, 92 Stat. 2682, as amended by Pub. L. 98-249, § 1(a), Mar. 31, 1984, 98 Stat. 116; Pub. L. 98-271, § 1(a), Apr. 30, 1984, 98 Stat. 163; Pub. L. 98-299, § 1(a), May 25, 1984, 98 Stat. 214; Pub. L. 98-325, § 1(a), June 20, 1984, 98 Stat. 268 [set out as an Effective and Applicability Provisions note preceding section 101 of Title 11, Bankruptcy], read as follows:

§ 2256. Habeas corpus from bankruptcy courts

A bankruptcy court may issue a writ of habeas corpus—

(1) when appropriate to bring a person before the court—

(A) for examination;

(B) to testify; or

(C) to perform a duty imposed on such person under this title; or

(2) ordering the release of a debtor in a case under title 11 in custody under the judgment of a Federal or State court if—

(A) such debtor was arrested or imprisoned on process in any civil action;

(B) such process was issued for the collection of a debt—

(i) dischargeable under title 11; or

(ii) that is or will be provided for in a plan under chapter 11 or 13 of title 11; and

(C) before the issuance of such writ, notice and a hearing have been afforded the adverse party of such debtor in custody to contest the issuance of such writ.

Section 402(b) of Pub. L. 95-598 was amended by section 113 of Pub. L. 98-353 Title I, July 10, 1984, 98 Stat. 343, by substituting "shall not be effective" for "shall take effect on June 28, 1984", thereby eliminating the amendment by section 250(a) of Pub. L. 95-598, effective June 27, 1984, pursuant to section 122(c) of Pub. L. 98-353, set out as an Effective and Applicability Provisions note under section 151 of this title.

Section 121(a) of Pub. L. 98-353 directed that section 402(b) of Pub. L. 95-598 be amended by substituting "the date of enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984 [i.e. July 10, 1984]" for "June 28 1984". This amendment was not executed in view of the prior amendment to section 402(b) of Pub. L. 95-598 by section 113 of Pub. L. 98-353.

Prior Provisions

A prior section 2256, added Pub. L. 95-144, § 3, Oct. 28, 1977, 91 Stat. 1220, which related to jurisdiction of proceedings relating to transferred offenders, was transferred to section 3244 of Title 18, Crimes and Criminal Procedure, by Pub. L. 95-598, Title III, § 314(j), Nov. 6, 1978, 92 Stat. 2677.

OPPOSITION
BRIEF

No. 09-9000

IN THE SUPREME COURT OF THE UNITED STATES

HENRY W. SKINNER,
Petitioner,

v.

LYNN SWITZER, District Attorney for the
31st Judicial District of Texas,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

(Capital Case)

Whether a convicted state prisoner, after failing to meet the requirements to gain access to biological evidence that was available at trial for DNA testing through the applicable state post-conviction statutes, may then seek such access through a 42 U.S.C. § 1983 action.

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STATEMENT OF THE CASE

I. Procedural background

Petitioner Henry W. Skinner ("Skinner") was convicted of capital murder in 1995 for the murders of his girlfriend, Twila Busby, and her two mentally challenged sons, Elwin Caler and Randy Busby, and sentenced to death. The conviction and sentence were upheld by the Texas Court of Criminal Appeals ("TCCA"). *Skinner v. State*, 956 S.W.2d 532 (Tex. Crim. App. 1997), *cert. denied*, 523 U.S. 1079 (1998). Skinner filed a state application for writ of habeas corpus in 1998 that the TCCA dismissed based upon the trial court's determination that it was untimely filed. Skinner filed an initial federal habeas petition in the United States District Court for the Northern District of Texas, Amarillo Division, (the "Northern District") in 1999 that was administratively closed in 2000, and stayed so that Skinner could return to state court to present his habeas claims after a change in Texas law. Skinner filed his second state habeas application in 2001 that the TCCA dismissed.

Skinner filed a motion to obtain post-conviction DNA testing in the 31st District Court, Gray County, Texas on October 9, 2001. The 31st District Court denied the motion and the TCCA affirmed the decision. *Skinner v. State*, 122 S.W.3d 808 (Tex. Crim. App. 2003). Skinner did not seek certiorari review.

Skinner filed an amended federal habeas petition in the Northern District in 2002. In connection with his federal habeas petition, Skinner filed a motion contending that additional DNA testing was necessary in order for him to prove that he had been prejudiced by his counsel's failure to ask for the testing prior to trial. On May 18, 2004, United States Magistrate Judge Clinton E. Averitte denied the request for additional DNA testing. On August 15, 2005, Skinner renewed his motion for additional DNA testing; and Magistrate Judge Averitte again denied the motion on October 4, 2005. Also in connection with Skinner's 2002 federal habeas petition, the Northern District partially granted Skinner's motion for discovery and allowed a deposition to be taken, and in November 2005 held an evidentiary hearing. Both parties filed post-hearing briefs and reply briefs.

Magistrate Judge Averitte issued a Report and Recommendation recommending that Skinner's 2002 application for a writ of habeas corpus be denied, finding that Skinner failed to make a substantial showing of the denial of a federal constitutional right on any of his claims. *Skinner v. Quarterman*, No. 2:99-CV-0045, 2007 WL 582808, at *43 (N.D. Tex. Feb. 22, 2007) (unpublished). United States District Judge Mary Lou Robinson adopted the report and recommendation of Magistrate Judge Averitte. *Id.* at *1. The Northern District then denied Skinner's application for certificate of appealability. *Skinner v. Quarterman*, No. 2:99-CV-0045, 2007 WL 1953503 (N.D. Tex. Jul. 2, 2007) (unpublished). The United States Court of Appeals for the Fifth Circuit granted the certificate of appealability in part and denied in part. *Skinner v. Quarterman*, 528 F.3d 336 (5th Cir. 2008). The Fifth Circuit ultimately affirmed. *Skinner v. Quarterman*, 576 F.3d 214 (5th Cir. 2009), *cert. denied*, --- S.Ct ----, No. 09-7784, 2010 WL 680586 (Mar. 1, 2010).

Skinner filed a second motion to obtain post-conviction DNA testing in the 31st District Court, Gray County, Texas on July 30, 2007. The 31st District Court also denied the second motion and the TCCA again affirmed the decision. *Skinner v. State*, 293 S.W.3d 196 (Tex. Crim. App. 2009). Skinner did not seek certiorari review.

On November 27, 2009, Skinner filed a 42 U.S.C. § 1983 action in the Northern District and moved for a preliminary injunction requesting that Respondent Lynn Switzer, District Attorney for the 31st Judicial District of Texas, ("Switzer") release materials for post-conviction DNA testing. Switzer moved for dismissal on several grounds and opposed the injunction. The Northern District dismissed Skinner's § 1983 action; and the Fifth Circuit affirmed the dismissal. *Skinner v. Switzer*, No. 2:09-CV-0281, 2010 WL 273143 (N.D. Tex. Jan. 20, 2010), *aff'd*, No. 10-70002, 2010 WL 338018 (5th Cir. Jan. 28, 2010) (per curiam). Skinner now seeks certiorari review.

II. Facts of the crime

In its opinion granting a certificate of appealability in part, the Fifth Circuit summarized the evidence of Skinner's capital crime as follows:

> In March 1995, a jury convicted Skinner of murdering his girlfriend, Twila Busby, and her two mentally retarded sons, Randy Busby and Elwin Caler, on New Year's Eve of 1993. Twila, Randy, and Elwin were strangled, bludgeoned, and stabbed in their house shortly before midnight.
>
> At midnight, a police officer found Elwin, in bloodstained undershorts, sitting on the porch of a neighbor's house with stab wounds under his left arm and on his right hand and stomach. He was taken to a hospital and died shortly thereafter. Investigating Elwin's stabbing, the police went to the home where he lived with Twila, Randy, and Skinner. The police noticed a trail of blood on the ground running from the front porch to the fence line, a blood smear on the glass storm door, and a knife on the front porch. They found Twila dead on the living room floor. She had been strangled into unconsciousness, then beaten on the head with a blunt object at least fourteen times. A bloodstained axe handle and plastic trash bag containing a knife and bloody towel lay nearby. She exhibited signs of recent sexual intercourse. In a bedroom, officers found Randy dead in an upper bunk. His body was lying face down, and he had been stabbed three times in the back.
>
> On the door frame between the bedroom and a utility room, officers found a bloody hand print roughly two feet above the floor. Bloody prints were also found on the door knob of the door connecting the utility room to the kitchen and on the doorknob of the utility room door opening to the backyard. The prints were Skinner's.
>
> Suspecting Skinner, the police sought and found him at 3:00 a.m. in the house of Andrea Reed, his former girlfriend, standing in a closet wearing heavily bloodstained jeans and socks and bearing a gash on the palm of his right hand. DNA testing showed that blood on Skinner belonged to Twila and Elwin. Skinner appeared intoxicated, and a toxicology test taken at 5:48 a.m. revealed alcohol and codeine.

Skinner was arrested, and in a statement to police he claimed not to recall much of what had transpired that evening.

At trial, the night's happenings were filled in by others. A friend, Howard Mitchell, went to Twila's and Skinner's home around 10:30 p.m. to give them a ride to his New Year's Eve party. When he arrived, Mitchell found Skinner passed out on the couch, apparently drunk. Unable to wake Skinner, Mitchell left with Twila for the party, where she was followed around by her drunken uncle, Robert Donnell, who made rude sexual advances toward her. Twila quickly became agitated by Donnell and had Mitchell take her back home. Mitchell dropped her off between 11:00 and 11:15 p.m. and left without going inside.

The trail of witnesses runs cold during the fateful hour before midnight but picks up thereafter. At midnight, roughly at the same time the police officer found Elwin, Reed answered a knock at the door of her trailer, which was about four blocks from Skinner's home. Skinner stood outside the door in blood-soaked shirt and pants and wearing socks but no shoes; he told Reed he had been stabbed and shot. He removed his shirt, but Reed could find no injuries except for the cut on the palm of his hand, which she bandaged for him. Skinner stayed with Reed for roughly three hours until the police arrived to apprehend him.

Reed testified that Skinner appeared intoxicated and disoriented and made many inconsistent statements about the causes of his injury and the course of events. Reed tried to call police, but Skinner threatened to kill her [and her children] if she did. Skinner eventually offered to tell Reed what really had happened if she would promise not to tell anyone; she promised, and Skinner told her he thought he had kicked Twila to death.[1] In a later statement to police, he claimed he woke up

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[1] Reed's trial testimony and federal habeas corpus evidentiary hearing testimony differed. Petitioner claims that Reed's evidentiary hearing testimony is the true testimony. *Petition for Writ, p. 9 n.5.* There were, however, several witnesses called at the evidentiary hearing to rebut her testimony there, and to corroborate that Reed's trial testimony was in fact accurate—that Skinner had told Reed on the night of the murders that Skinner thought he had killed Twila and that Skinner had threatened to kill Reed and her children. *Skinner v. Quarterman*, No. 2:99-CV-0045, 2007 WL 582808, at *9-10 (N.D. Tex. Feb. 22, 2007) (unpublished) . Regardless, Reed's testimony was not so critical that Skinner could not have been convicted without it and there were numerous witnesses and pieces of evidence that supported the State's case against Skinner. *Id.* at *15.

> on the couch to find someone standing over him with a knife and that he ran out of the house. He also guessed that Twila might have killed her sons and cut him with a knife, but he claimed not to remember plainly.[2]

Skinner v. Quarterman, 528 F.3d 336, 339-40 (5th Cir. 2008).

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Court should deny certiorari review because Skinner's § 1983 action—even if cognizable—is barred by limitations. Additionally, even if Skinner were allowed to test additional items of evidence, no item of evidence exists that would conclusively prove that Skinner did not commit murder. State and federal courts alike have determined that Skinner's conviction and sentence were constitutional. Finally, Texas has post-conviction procedures in place to allow individuals to access evidence for DNA testing and Skinner failed to meet the applicable standards under those procedures.

I. A § 1983 action is barred by limitations

Skinner fails to explain his lack of diligence in not filing a § 1983 action until his execution became imminent. Skinner claims that he began making requests to Gray County district attorneys as early as 2000 for access to crime scene evidence to subject it to DNA testing, and that all of those requests were ignored or denied. *Petition for Writ, p. 5.* Additionally, Skinner filed his first post-conviction motion in state court to obtain access to such evidence in 2001. The motion was denied and the TCCA affirmed the denial, *Skinner v. State*, 122 S.W.3d 808 (Tex. Crim. App. 2003), with Skinner failing to seek certiorari review.

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[2] He stated, "I think that Twila came home drunk and had a knife. I don't know if she stabbed the boys and then we got into a fight or [she] tried to stab me or what the hell happened. I just don't know. But I think she's the one that cut my hand. I think that." (footnote in original).

Skinner claims that if his § 1983 action is allowed to proceed, he "has a genuine prospect of prevailing on the merits and, perhaps, ultimately proving his innocence." *Petition for Writ, p. 4*. Skinner, however, could not possibly prevail in a § 1983 action even if this Court were to create a rule that such a cause of action to obtain evidence post-conviction for DNA testing does exist.

Switzer did not file an answer in the Northern District because Skinner's suit was dismissed prior to the need to file one. *See* FED. R. CIV. P. 12(a)(4). Switzer, however, would assert several affirmative defenses, including immunity and statute of limitations. This Court can determine simply by Skinner's Petition and the pleadings below that he was aware as early as 2000 that the Gray County district attorneys were not going to provide him access to the evidence he seeks to subject to post-conviction DNA testing. *Petition for Writ, p. 5*. His § 1983 claim would therefore be barred by the applicable two-year statute of limitations in Texas because Skinner filed his § 1983 claim on November 27, 2009. *Owens v. Okure*, 488 U.S. 235, 240-41, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989); TEX. CIV. PRAC. & REM. CODE § 16.003.

It is appropriate for the Court to deny certiorari review in this case because Skinner's claim is destined to fail even if the Court determined that he has a cognizable § 1983 claim.

II. Additional DNA testing would not be outcome determinative

A petition for a writ of certiorari will only be granted for compelling reasons. *See* U.S. S.Ct. R. 10. The Court may want to address the question presented at some point, but this is not the appropriate case with which to address it. There was ample evidence in this case to find Skinner guilty of committing three murders, and certiorari review would be a futile exercise. The circumstances of this case are far different from those in *District Attorney's Office for the Third Judicial District v. Osborne*, --- U.S. ----, 129 S.Ct. 2308, 2320 (2009). That is—no physical evidence exists that would conclusively establish someone other than Skinner killed three people on New Year's Eve of 1993. This case is also quite different than *Osborne* because unlike Alaska, Texas has enacted legislation specifically addressing the issue of evidence requested post-conviction for DNA testing.

Petitioner claims that the circuit courts of appeals are split regarding the question presented. *Petition for Writ, pp. 2-3*. A disagreement among the circuits does not entitle Skinner to certiorari review, and is simply one factor the Court may consider. The Court has observed that "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . . ." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S.Ct. 422, 67 L.Ed. 712 (1923). This Court does not sit for the benefit of the particular litigants. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955) (citations omitted). As explained by this Court:

> If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable. It has long been the Court's considered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied . . . . It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.

Clinton v. Jones, 520 U.S. 681, 690 n.11, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997) (internal quotations and citations omitted).

The precise facts of this case do not require the Court to formulate a rule of constitutional law. Skinner treats this case as though if he is allowed to test additional items of evidence, the testing will conclusively show that he is innocent. This is simply not correct. The evidence presented at trial overwhelmingly showed Skinner's guilt; and his conviction and sentence have been upheld every step of the way. Furthermore, DNA evidence often fails to provide "absolute proof" of anything. *Osborne*, 129 S.Ct. at 2327 (Alito, J., concurring).

> DNA evidence creates special opportunities, risks, and burdens that implicate important state interests. Given those interests-and especially in light of the rapidly evolving nature of DNA testing technology-this is an area that should be (and is being) explored through the working of normal democratic processes in the laboratories of the States.

Id. at 2326 (citation omitted).

The Texas Court of Criminal Appeals, in its decision upholding the denial of Skinner's second motion for post-conviction DNA testing, stated that:

> [I]f trial counsel declined to seek testing as a matter of reasonable trial strategy, then post-trial testing would not usually be required by the interests of justice. To hold otherwise would allow defendants to "lie behind the log" by failing to seek testing because of a reasonable fear that the results would be incriminating at trial but then seeking testing after conviction when there is no longer anything to lose.

Skinner v. State, 293 S.W.3d 196, 202 (Tex. Crim. App. 2009) (emphasis in original).

"DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent." *Osborne*, 129 S.Ct. at 2316. The Fifth Circuit stated that there was ample evidence that Skinner was the murderer. *Skinner v. Quarterman*, 576 F.3d 214, 219 (5th Cir. 2009), *cert. denied*, --- S.Ct ----, 2010 WL 680586 (Mar. 1, 2010).

The items Skinner seeks to test were available to him for testing at the time of his trial. In fact, some items were subject to DNA testing while others were not, even though available. The litigation in this case, that spans more than a decade, reveals that the decision not to have additional items tested was a trial strategy that was appropriate under the facts and circumstances of the murders underlying Skinner's conviction. *Skinner v. Quarterman*, No. 2:99-CV-0045, 2007 WL 1953503, at *3 (N.D. Tex. July 2, 2007) (unpublished). The Fifth Circuit stated that "[c]onducting its own DNA test [on the crime scene evidence not tested by the state] would also have deprived the defense of its primary argument at trial that the government conducted a shoddy investigation." *Skinner v. Quarterman*, 528 F.3d 336, 341 (5th Cir. 2008). Additionally, that "Skinner's counsel made an informed, strategic decision that DNA testing was at least as likely to incriminate Skinner as to exonerate him and that additional testing was a gamble not worth taking." *Id.* at 342.

Even if Skinner was granted access to the evidence he seeks to subject to DNA testing, the results of such testing would not prove, or even tend to prove, Skinner's innocence of the crimes for which he was convicted. In other words, even if DNA found at the scene of the murders did match someone other than Skinner, it would not exonerate him. Indeed, Skinner does not contend that the results of any DNA testing would in fact be exculpatory. Skinner's Petition is inconsistent regarding his expectations of results of additional DNA testing. At one point, Skinner states that "**[d]epending on the results**, testing of these items **could** prove his innocence;" and he repeatedly couches possible results in terms of "could" and "might." *Petition for Writ, p. 13* (emphasis added). Later, Skinner states that his "guilt or innocence can be determined by DNA testing," *id., p. 29*, which is entirely false.

Skinner asks this Court to create a post-conviction constitutional right under § 1983 to access crime scene evidence in order to conduct DNA testing—but even if the Court were to do so—its decision is not necessary for Skinner's case. Additional DNA testing in this case would not affirmatively prove anything. This is not a case where the proverbial "smoking gun" that would clear Skinner's name exists in the items of evidence that were not previously subjected to DNA evidence. A jury weighing the precise facts of this case—and the alternative theories and defenses laid out in Skinner's Petition—determined that Skinner committed three murders. The Court should deny certiorari.

III. Skinner essentially wants a new trial

Skinner—being proved guilty after a fair trial—does not have the same liberty interests as a free man. *Osborne*, 129 S.Ct. at 2320. "Given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." *Id.* (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464, 101 S.Ct. 2460, 69 L.Ed.2d 158 (1981)). Skinner's due process rights are not parallel to a trial right, and are instead analyzed in light of the fact that he has already been found guilty at a fair trial. *Id.* After being found guilty, he has only a limited interest in post-conviction relief. *Id.*

Texas has flexibility in deciding what procedures are needed in the context of post-conviction relief. *Id.* Due process does not dictate the exact form that states must follow when choosing to offer relief from convictions. *Id.* (citing *Pennsylvania v. Finley*, 481 U.S. 551, 559, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987)). Only if a state's post-conviction relief procedures are fundamentally inadequate to vindicate the substantive rights provided may they be upset. *Id.* The infractions that violate fundamental fairness fall into a very narrow category; because beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. *Medina v. California*, 505 U.S. 437, 443, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992).

> The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order . . . [I]t has never been thought that decisions under the Due Process Clause establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.

Id. at 443-44 (internal quotation marks and citation omitted).

Skinner's Petition goes beyond the question presented and reads as though he is attempting at this stage to convince this Court that he was wrongfully convicted and did not receive a fair trial. Skinner states that "while [he] was convicted of capital murder, there are disturbing and unresolved questions about the accuracy of the jury's verdict." *Petition for Writ, p. 14.*

First, this Court recently denied certiorari review of Skinner's appeal in his federal habeas action where it was determined that Skinner's conviction and death sentence were constitutional. *Skinner v. Quarterman*, 576 F.3d 214 (5th Cir. 2009), *cert. denied,* --- S.Ct ----, 2010 WL 680586 (Mar. 1, 2010). Additionally, "[f]ederal courts are not forums in which to relitigate state trials." *Herrera v. Collins*, 506 U.S. 390, 401, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (citing *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)). Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears. *Id.* at 399. The guilt or innocence determination in state criminal trials is "a decisive and portentous event." *Id.* at 401 (citing *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)). "Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens." *Id.* Innocence or guilt must be determined in some sort of a judicial proceeding in any system of criminal justice. *Id.* at 398.

"Finality is essential to both the retributive and the deterrent functions of criminal law." *Calderon v. Thompson*, 523 U.S. 538, 555, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). "Without finality, the criminal law is deprived of much of its deterrent effect." *Id.*

Skinner was convicted in a fair trial and his conviction has been upheld. There is no indication that should the additional items of evidence Skinner seeks to subject to DNA testing be tested, that the testing will affirmatively show that Skinner did not murder three people. It is not absolutely necessary for the Court to consider questions of a constitutional nature for a decision in this case. Certiorari review is therefore not warranted and should be denied.

IV. Texas has post-conviction procedures for obtaining evidence for DNA testing

Skinner's claim must be analyzed within the framework of Texas's procedures for post-conviction relief. *Osborne*, 129 S.Ct. at 2320. Chapter 64 of the Texas Code of Criminal Procedure provides an avenue in Texas for convicted prisoners to obtain post-conviction DNA testing of biological material in certain circumstances. Texas's statutory requirement that post-conviction testing results be exculpatory is not met if the DNA evidence would "merely muddy the waters." *Watkins v. State*, 155 S.W.3d 631, 633 (Tex. App.—Texarkana 2005, no pet.). Instead, the evidence must tend to prove the defendant's innocence. *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002).

"Federal courts may upset a State's post-conviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Osborne*, 129 at 2320. There is nothing fundamentally inadequate about Texas's post-conviction procedures. Indeed, the Texas statute contains all of the "key elements" that the Innocence Project recommends should be "included in a good DNA access law." *See* The Innocence Project, Fact Sheets, http://www.innocenceproject.org/Content/304.php (last visited Mar. 11, 2010). For instance, unlike in many states, DNA testing is not restricted to a certain class of inmate. *See* TEX. CODE CRIM. PROC. ANN. art. 64.01 (people convicted of any crime may apply). There is no restriction that an individual is currently serving time. *See id.* (anyone with a criminal record may apply). Additionally, there are no time limits for requesting DNA testing or any procedural hurdles or sunset provisions that restrict access. *See id.*

To obtain post-conviction DNA testing in Texas, the convicted person must establish that unaltered evidence is available for testing; that identity was an issue in the case; that by a preponderance of the evidence a reasonable probability exists that he would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing; and that the request is not to delay the execution of the sentence. *Prible v. State*, 245 S.W.3d 466, 467-68 (Tex. Crim. App. 2008) (citing TEX. CODE CRIM. PROC. ANN. art. 64.03(a)). The legislative history of Chapter 64 shows that the Texas Legislature intended to provide post-conviction DNA testing in instances where the testing would very clearly establish the convicted person's innocence. *Blacklock v. State*, 235 S.W.3d 231, 232-33 (Tex. Crim. App. 2007); *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002).

Skinner pursued such avenue to obtain post-conviction DNA testing by filing two separate motions in the 31st Judicial District Court of Texas, and such testing was denied, with the denials upheld by the Texas Court of Criminal Appeals. Skinner failed to seek certiorari review of either denial. Additionally, Skinner affirmatively disclaimed in the Northern District that he was alleging that any injury was caused by state court judgments denying him access to the evidence he seeks. *Skinner v. Switzer*, No. 2:09-CV-0281, 2010 WL 273143 at *5 (N.D. Tex. Jan. 20, 2010), *aff'd*, No. 10-70002, 2010 WL 338018 (5th Cir. Jan. 28, 2010) (per curiam).

Despite this affirmative disclaimer, Skinner states that his "as-applied challenge to Texas's procedures may be accurately evaluated by the district court on remand . . . ." *Petition for Writ, p. 29*. This is precisely the type of argument the Northern District stated would likely be barred by the *Rooker-Feldman* doctrine as asserted in Switzer's motion to dismiss. *Skinner*, 2010 WL 273143, at *4-5. The Northern District determined that Skinner's complaint did not directly assert an as applied challenge to Chapter 64, but that in Skinner's response to

Switzer's motion to dismiss, Skinner contended that Chapter 64 is unconstitutional as applied to his case. *Id.* at *4. The Northern District stated that such an allegation appears to directly challenge the state court action and was an argument that the TCCA violated Skinner's due process rights by incorrectly applying the state statute. *Id.* The court went on to say that "[b]y directly pointing to a state court's actions as a source of injury, and by asking the Court to review such state court actions, plaintiff raises claims likely barred by *Rooker-Feldman*." *Id.* (citing *Exxon Mobil Corp.*, 544 U.S. 280, 284, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005)). The Northern District also stated that "[i]f the [Texas Court of Criminal Appeals] did indeed incorrectly and unconstitutionally apply Article 64 of the Texas Code of Criminal Procedure, the proper relief for plaintiff would have been to appeal the judgment directly to the United States Supreme Court." *Id.*

If Skinner was going to make a procedural due process claim, he should have sought certiorari review of the trial court's denials of his motions for post-conviction access to biological evidence for DNA testing, but he failed to do so. His failure to do so until now, when his execution is imminent, only evidences his attempt to manipulate the legal system in order to delay execution of his sentence.

CONCLUSION

For these reasons, Respondent Switzer respectfully requests that the Court deny Skinner's Petition for Writ of Certiorari.

Respectfully submitted,

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No. 09-9000

IN THE SUPREME COURT OF THE UNITED STATES

HENRY W. SKINNER,
Petitioner,

v.

LYNN SWITZER, District Attorney for the
31st Judicial District of Texas,
Respondent.

Certificate of Service

I hereby certify that on this 15th day of March, 2010, I served Respondent's Brief in Opposition to Petition for Writ of Certiorari in the above styled and numbered cause on all parties required to be served pursuant to Supreme Court Rule 29, by delivering a copy by third-party commercial carrier for next day delivery to:

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REPLY
BRIEF

No. 09-9000

IN THE SUPREME COURT OF THE UNITED STATES

HENRY W. SKINNER,
Petitioner,

-v-

LYNN SWITZER, DISTRICT
ATTORNEY FOR THE 31ST
JUDICIAL DISTRICT OF TEXAS
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETITIONER IS SCHEDULED TO BE
EXECUTED ON MARCH 24, 2010

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Petitioner Henry W. Skinner submits this reply to Respondent's Brief in Opposition to his Petition for Writ of Certiorari.

I. RESPONDENT FAILS TO ADDRESS *ANY* OF THE ARGUMENTS MADE IN THE PETITION FOR WHY CERTIORARI SHOULD BE GRANTED.

Remarkably, Respondent's Brief in Opposition fails to address in any significant way the reasons advanced in Mr. Skinner's Petition in support of granting certiorari. Respondent does not deny that a deep circuit split exists regarding the issue presented here: whether a prisoner who claims he was denied due process in the application of a State's post-conviction DNA testing statute should bring such a challenge under 42 U.S.C. § 1983 or in a petition for writ of habeas corpus.[1] (*See* Brief in Opposition ("Opp.") at 8; *cf.* Petition ("Pet.") at 16-21 (describing the extensive conflict among the Courts of Appeals).) Respondent fails to identify any development since this Court granted review on precisely this issue in 2008 (without ultimately deciding it) that would make resolving that dispute less urgent now. Respondent does not mention, much less defend, the Fifth Circuit's decision in *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir. 2002), or the Fourth Circuit decision on which *Kutzner* relied, *see Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002). Nor does Respondent attempt to explain how *Kutzner* survives *Wilkinson v. Dotson*, 544 U.S. 74 (2005), on which four other Circuits have relied in taking the opposite view. And Respondent nowhere disputes that the issue presented here is one of profound and continuing importance, on which the lower courts require guidance.

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[1] Nor does Respondent's Brief in Opposition cite, much less discuss, a single one of the numerous federal appellate decisions that are the focus of Mr. Skinner's argument concerning the need for this Court to resolve the existing split.

The closest Respondent comes to addressing whether certiorari should be granted in this case is an *acknowledgement* halfway through her brief that "the circuit courts of appeals are split regarding the question presented," (*see* Opp. at 8), which she then shrugs off with the response that such a "disagreement among the circuits does not entitle [Mr.] Skinner to certiorari review, and is simply one factor the Court may consider."[2] *Id.* Mr. Skinner of course concedes that such a split does not *entitle* him to review that is, by its nature, discretionary. Nevertheless, the compelling reasons Mr. Skinner has shown for why certiorari is appropriate—the split among the circuits, the evident conflict with this Court's precedent, the importance of the issue to the administration of justice, and the fact this Court only recently granted certiorari on, and then failed to resolve, the same issue—provide ample reason for the Court to exercise its discretion to grant certiorari. Respondent offers not a single counter-argument directed to any of these points.

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[2] The Brief in Opposition at several points reflects significant confusion about the exact nature of Mr. Skinner's legal claim. For example, Respondent asserts that Mr. Skinner "could not possibly prevail . . . even if this Court were to create . . . a cause of action to obtain evidence post-conviction for DNA testing . . . ." (Opp. at 7; *see also id.* at 12 ("Skinner asks this Court to create a post-conviction constitutional right under § 1983 to access crime scene evidence in order to conduct DNA testing . . . .").) Mr. Skinner is *not* asking this Court to "create" any new "constitutional right" or "cause of action." He seeks only to pursue the cause of action that this Court has already acknowledged—that procedural due process requires a State to provide "'fundamental fairness in [the] operation'" of its state-law DNA testing scheme, even in the absence of a substantive federal right to such testing. *Dist. Att'y's Office v. Osborne*, 129 S. Ct. 2308, 2320 (2009) (citation omitted). The question presented here is only what the appropriate vehicle is for pursuing that claim.

Instead, Respondent presents a mishmash of trivial contentions having little if anything to do with the Question Presented. Some introduce confusion by mischaracterizing Mr. Skinner's claim or injecting irrelevant factual issues. Others assert that the Court should turn aside the straightforward, narrow, and clearly presented legal issue in this case because the District Court might have to sort out certain complex and fact-bound disputes on remand. As we show below, nothing in the Brief in Opposition should prevent this Court from granting review, given the clear circuit split and the continuing importance of the question presented.

II. DNA TEST RESULTS COULD INDEED SHOW MR. SKINNER'S INNOCENCE.

Foremost in Respondent's attempts to divert the Court's attention to the issues the District Court would have to consider on remand is her bald assertion that DNA testing could not establish Mr. Skinner's innocence. (Opp. at 9-10, 11-12, 15.) This assertion is not germane to the Question Presented. Equally important, it is simply wrong. For example, included among the items Mr. Skinner seeks to have tested are Twila Busby's fingernail clippings and a windbreaker jacket found next to her body. If the jacket contained sweat stains of suspect Robert Donnell (it is similar in appearance to one he is known to have worn) and his DNA were found under Ms. Busby's fingernails, those results alone would provide convincing evidence that he, not Mr. Skinner, was the murderer. The presence of Donnell's

DNA on other objects, such as the knives or the cup towel, would further cement that conclusion. (*See* Pet. at 12-14.)

Respondent avoids engaging in a discussion of the actual evidence. Instead, insisting that Mr. Skinner must be guilty, she points to the jury's verdict, (Opp. at 12), the Fifth Circuit's statement that "ample evidence" showed that Mr. Skinner was the murderer, (*id.* at 10), and Respondent's own self-serving description of the evidence against Mr. Skinner as "overwhelming," (*id.* at 9). But it is, of course, *always* the case that a convicted person who is later exonerated by DNA testing has first been found guilty, often on "ample" evidence. And it is frequently the case that, before exonerating DNA results are obtained, prosecutors and courts characterize the evidence of guilt as "overwhelming[]."[3]

Respondent also argues that Mr. Skinner's failure to ask for DNA testing prior to trial should weigh against the Court granting certiorari on the unrelated legal issue presented here. (Opp. at 11.) But, as Mr. Skinner has pointed out, that purported "failure" was the very basis on which the CCA denied his second motion for DNA testing, and will be at the heart of this case on remand if the Court determines that Mr. Skinner's suit can be maintained under § 1983. (*See* Petitioner's Application for Stay of Execution, No. 09A743 ("Stay App.") at 14-15.)

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[3] *See Osborne*, 129 S. Ct. at 2337 (Stevens, J., dissenting) ("DNA evidence has led to an extraordinary series of exonerations . . . [even] in cases where the convicted parties confessed their guilt and where [the] trial evidence against them appeared overwhelming."); *see also id.* at 2337 n.9 (citing Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 109 (2008), as documenting that in 50% of DNA exoneration cases courts had commented on the defendant's likely guilt and in 10% had characterized the evidence of guilt as "overwhelming").

The constitutionality of denying DNA testing on this ground is far from clear, given the sharp division between the concurring and dissenting Justices in *Dist. Att'y's Office v. Osborne*, 129 S. Ct. 2308 (2008), on this very issue. *Compare id.* at 2329-30 (Alito, J., concurring) *with id.* at 2336 n.8 (Stevens, J., dissenting). For present purposes, it suffices to say that this issue is not now before this Court, and does not block the Court's path to reaching and deciding the narrow, important, and contested legal issue framed by the Question Presented.[4]

Finally, Respondent inexplicably advances the time-honored principle that the Court should not unnecessarily "formulate a rule of constitutional law." (Opp. at 9.) Mr. Skinner's Question Presented neither asks nor requires the Court to take such a step. Instead, the Court must reconcile two congressional enactments: 42

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[4] In suggesting that a defendant's decision not to ask for DNA testing prior to trial should permanently disqualify him from obtaining such testing, Respondent's argument echoes both the CCA's opinion denying Mr. Skinner's second state motion for DNA testing and Justice Alito's concurring opinion in *Osborne*. Both warned that defendants might take their chances at trial and then seek post-conviction testing when there is nothing to lose. *See Skinner v. State*, 293 S.W.3d 196, 202 (Tex. Crim. App. 2009); *cf. Osborne*, 129 S. Ct. at 2329 (Alito, J., concurring). But this argument presumes that only a guilty defendant would deliberately forego pretrial DNA testing. The present case offers an instructive counter-example. Mr. Skinner lived in the house where the murders occurred, and does not deny he was in the same room with two of the victims when they sustained lethal wounds. His DNA would surely be found in the house, and the victims' DNA would likely be found on him. In contrast to *Osborne*, where the defendant was accused of raping a prostitute and the only DNA material to be tested was semen found in a condom, even an innocent defendant in Mr. Skinner's situation might reasonably fear that jurors would draw the wrong inference from those test results. A defendant who chooses in such circumstances to rest on his constitutionally-guaranteed presumption of innocence should not be disadvantaged as a consequence—not when the ultimate and overriding objective is to avoid punishing an innocent person. Finally, whatever the merits of holding a defendant forever to his pre-trial choice about conducting testing, in Mr. Skinner's case, forensic DNA testing was relatively new at the time of trial and Texas had no procedures for post-conviction testing, so it is idle to describe him as having "chosen" between those two options.

U.S.C. § 1983 on the one hand, and the federal habeas corpus statutes on the other. Only if the Court grants certiorari and thereafter reverses the decision below will Mr. Skinner's constitutional claims be ripe for consideration, and then only by the District Court on remand.

III. RESPONDENT'S ASSERTION THAT THE STATUTE OF LIMITATIONS BARS MR. SKINNER'S SUIT IS LIKEWISE BOTH PREMATURE AND WRONG.

Again urging the Court to focus on issues that will have to be decided by the District Court on remand, Respondent contends that Texas's two-year statute of limitations bars Mr. Skinner's § 1983 claims. This argument also need not detain the Court for long. The statute of limitations is an affirmative defense, and has not been at issue in this case because the lower courts have disposed of the suit *solely* on the basis of their conclusion that Mr. Skinner's claim sounds exclusively in habeas. In fact, Respondent never mentioned the issue in the courts below. If this Court agrees with Mr. Skinner that a § 1983 action is the appropriate vehicle for pressing his due process challenge, Respondent can attempt to raise her statute of limitations defense on remand.

Even if the issue were relevant at this juncture, Respondent's assertion that the statute of limitations bars this action is wrong because it ignores the doctrines of continuing violation and equitable tolling, under either of which Mr. Skinner's lawsuit was timely filed. First, a continuing violation "relieves a plaintiff of establishing that all of the complained-of conduct occurred within the actionable period if the plaintiff can show a series of related acts, one or more of which falls within the limitations period." *Messer v. Meno*, 130 F.3d 130, 134-35 (5th Cir. 1997) (citation omitted). Over a period of years Mr. Skinner has made numerous requests in various forums for access to the physical evidence for DNA testing, all of which requests Respondent has denied, by either directly refusing to provide the evidence or opposing Mr. Skinner's attempts to gain access through the courts. (*See* Stay App. at 18-21 (describing Mr. Skinner's persistent efforts to obtain DNA testing).) This series of injurious acts by Respondent has continually revived the accrual date of the applicable statute of limitations.[5]

Apart from the continuing violations, Mr. Skinner's diligent pursuit of his rights over more than a decade would give him a powerful claim for equitable tolling. *See Young v. United States*, 535 U.S. 43, 49 (2002) (limitations periods are customarily subject to equitable tolling); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (federal courts have allowed equitable tolling in situations where claimants exercised due diligence in preserving their legal rights (citation omitted)). While Respondent is correct that ten years have elapsed since Mr. Skinner was first refused DNA testing, her implication that Mr. Skinner sat mute about that refusal the whole time is false. Almost continuously thereafter, Mr. Skinner had pending in some forum an effort to obtain that testing, and every one of those efforts was actively resisted by the State.

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[5] *See, e.g., Perez v. Laredo Junior College*, 706 F.2d 731, 733-34 (5th Cir. 1983) (continuing violations may dictate when the statute of limitations commences in § 1983 actions); *Jackson v. Galan*, 868 F.2d 165, 168 (5th Cir. 1989) (because sheriff's repeated garnishment of wages created a continuing due process violation, plaintiff could recover damages for garnishments more than one year prior to filing of the § 1983 suit).

In short, whether Mr. Skinner's claim is barred by the statute of limitations is not an issue here. Moreover, the Court can be confident that, if it grants certiorari, reverses, and remands for further proceedings, the statute of limitations will not automatically bar further consideration of the case.

IV. WHILE TEXAS HAS PROCEDURES FOR POST-CONVICTION DNA TESTING, A DUE PROCESS CHALLENGE CAN BE MADE REGARDING THEIR APPLICATION IN A PARTICULAR CASE.

Respondent points out that the States have wide latitude in establishing trial and post-conviction procedures, and that Texas has adopted post-conviction procedures for obtaining evidence for DNA testing. (Opp. at 13, 15.) As Respondent has it, the Court should deny certiorari here because "there is nothing fundamentally inadequate about [those] procedures," (Opp. At 16), which reflect some of the "'key elements'" encouraged by, e.g., The Innocence Project, (*id.*). This defense, too, is more appropriately reserved for presentation on remand. As with Respondent's other arguments, it too is wrong.

While States undoubtedly have wide latitude in establishing the procedures for vindicating liberty interests, such procedures must comport with fundamental fairness. *See, e.g.*, *Osborne*, 129 S. Ct. at 2320. And Respondent does not mention, much less challenge, Mr. Skinner's account of how Texas's procedures failed to meet that standard in this case. (*See* Petition at 5-7; Stay App. at 13-15.) Thus, Respondent's generic argument fails to offer any reason the Court should not grant certiorari to decide the narrow legal question actually presented by this case, much less any reason to assume Mr. Skinner would not prevail on his challenge to Texas's procedures on remand.[6]

Respondent goes on to assert that Mr. Skinner's as-applied challenge to Texas's procedures, once properly before the District Court on remand, would "likely be barred by the *Rooker-Feldman* doctrine . . . ." (Opp. at 17; *see also id.* at 18.) Respondent thus intimates that simply by virtue of having attempted to invoke Texas's available post-conviction DNA testing procedures in state court, Mr. Skinner would be foreclosed from ever alleging in federal court that those provisions were unconstitutionally applied to him.

That argument, however, is impossible to square with *Osborne*. This Court specifically faulted Osborne for having brought his § 1983 action without ever having invoked Alaska's "newly developing procedures for obtaining postconviction access to DNA." *Osborne*, 129 S. Ct. at 2321. Having never "tried to use the process provided to him by the State" or "attempted to vindicate the liberty interest that [later became] the centerpiece of his claim," Osborne could not "demonstrate the inadequacy of the state-law procedures available to him . . . ." *Id.* Simply put, "without trying [these procedures]," Osborne could "hardly complain that they d[id] not work in practice." *Id.*

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[6] Even on its own terms, Respondent's argument misapprehends the specifics of Mr. Skinner's due process claim as framed in his complaint. Respondent's point appears to be that Texas's post-conviction DNA testing provisions are adequate *on their face*, while Mr. Skinner's complaint alleges that they were *applied to him* in a manner that violated due process—not that they are "fundamentally inadequate" in the abstract. Thus, the features of Texas's post-conviction DNA testing statute that Respondent extols are irrelevant to the underlying issues in this case. (Opp. at 16-17.)

The evident implication of *Osborne* is that this Court reasonably expects that a state prisoner seeking post-conviction DNA testing should avail himself of existing state procedures for doing so. If those procedures are applied arbitrarily to deny such testing, *Osborne* suggests, the federal due process clause might provide a remedy. But, by Respondent's reasoning, the very act of attempting to invoke existing state procedures would automatically result in the dismissal on *Rooker-Feldman* grounds of any subsequent federal due process lawsuit. Because Respondent's view is impossible to reconcile with *Osborne*, it proves too much.

In sum, this Court in *Osborne* left the federal courthouse door open for cases exactly like this one—questioning whether a state has applied its DNA testing statute in so arbitrary a fashion as to deny due process. Given that such cases will continue to arise with some frequency, this Court should resolve the undisputed split among the circuits concerning whether such claims may be advanced under § 1983 or must be relegated exclusively to habeas corpus proceedings. Mr. Skinner's case is the ideal vehicle for resolving that narrow but important issue.

CONCLUSION

For the reasons stated above and in his Petition, Mr. Skinner respectfully urges the Court to grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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Dated: March 19, 2010

JOINT
APPENDIX

Supreme Court, U.S.
FILED
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No. 09-9000

In The
Supreme Court of the United States

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HENRY W. SKINNER,

Petitioner,

vs.

LYNN SWITZER,
District Attorney for the 31st Judicial District of Texas,

Respondent.

◆

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

◆

JOINT APPENDIX

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U.S. District Court
Northern District of Texas (Amarillo)
CIVIL DOCKET FOR
CASE #: 2:09-cv-00281-J-BB

Plaintiff

Henry Watkins Skinner

V.

Defendant

Lynn Switzer

District Attorney for the 31st Judicial District of Texas

Date Filed	#	Docket Text
11/27/2009	1	COMPLAINT against Lynn Switzer filed by Henry W Skinner. Clerk to issue summons(es). In each Notice of Electronic Filing the filer receives, the judge assignment is indicated in the subject line, and a link to the *Judges Copy Requirements* is provided. The court reminds the filer that any required copy of this and future documents must be delivered to the judge, in the manner prescribed, within three business days of filing. (Receipt No. 0539000000003015914 – $350.00) (Attachments: # 1 Civil Cover Sheet) (Robinson, Douglas) Modified on 12/23/2009 (plh). (Entered: 11/27/2009)

1/15/2010	40	REPORT AND RECOMMENDATION TO GRANT DEFENDANT'S MOTION TO DISMISS AND TO DISMISS 1983 COMPLAINT (Ordered by Magistrate Judge Clinton E Averitte on 1/15/2010) (djs) (Entered: 01/15/2010)
01/20/2010	42	ORDER Overruling 41 Objections, ADOPTING 40 Report and Recommendation, Granting Defendant's 28 Motion to Dismiss, and Dismissing § 1983 Complaint (Ordered by Judge Mary Lou Robinson on 1/20/2010) (djs) (Entered: 01/20/2010)
01/20/2010	43	JUDGMENT – Of equal date herewith, the undersigned US District Judge has entered an Order adopting the Report and Recommendation issued by the US Magistrate Judge and dismissing plaintiffs 42 USC § 1983 complaint. Judgment is entered accordingly. (Ordered by Judge Mary Lou Robinson on 1/20/2010) (djs) (Entered: 01/20/2010)
01/21/2010	44	NOTICE OF APPEAL to the Fifth Circuit as to 43 Judgment, 42 Order Adopting Findings and Recommendations by Henry Watkins Skinner. Filing fee $455, receipt number 0539000000003089400. T.O. form to appellant electronically at *Transcript Order Form* or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. (Robinson, Douglas) (Entered: 01/21/2010)

United States Court of Appeals
for the 5th Circuit

Court of Appeals Docket #: 10-70002

HENRY W SKINNER,

Plaintiff-Appellant

v.

LYNN SWITZER,
District Attorney for the 31st
Judicial District of Texas

Defendant-Appellee

01/25/2010	DEATH PENALTY CASE docketed. NOA filed by Appellant Mr. Henry W Skinner [10-70002] (MRW)
01/25/2010	UNOPPOSED MOTION filed by Appellant Mr. Henry W Skinner to expedite the appeal [6455536-2]. Date of service: 01/25/2010 via email – Attorney for Appellant(s): Owen, Robinson; Attorney for Appellee: White; US mail – Attorney for Appellee: White [10-70002] (DGR)
01/25/2010	APPEARANCE FORM FILED by Attorneys Robert Charles Owen and Douglas George Robinson in 10-70002 for Appellants Skinner, Henry W in 10-70002 [10-70002] (MRW)
01/26/2010	INITIAL CASE CHECK by Attorney Advisor complete. Action: Case OK to Process. [6456018-2] Initial AA Check Due satisfied.. [10-70002] (MRW)

01/28/2010	UNPUBLISHED OPINION ORDER FILED. [10-70002 Affirmed] Judge: JES, Judge: JLW, Judge: PRO; denying as unnecessary motion to expedite appeal filed by Appellant Mr. Henry W Skinner [*6455536-2*] [10-70002] (JMA)
01/28/2010	JUDGMENT ENTERED AND FILED. [10-70002] (JMA)
01/28/2010	MANDATE ISSUED FORTHWITH. [10-70002] (RFP)
02/04/2010	MOTION filed by Appellant Mr. Henry W Skinner to stay execution [6463621-2]. Date of service: 02/04/2010 via email – Attorney for Appellant(s): Owen, Robinson; Attorney for Appellee: White; US mail – Attorney for Appellee: White [10-70002] (DGR)
02/08/2010	NON DISPOSITIVE UNPUBLISHED OPINION FILED denying motion to stay execution filed by Appellant Mr. Henry W Skinner [6463621-2] Judge: JES, Judge: JLW, Judge: PRO. [10-70002] (ARC)
02/12/2010	SUPREME COURT NOTICE that petition for writ of certiorari [6543804-2] was filed by Appellant Mr. Henry W Skinner on 02/12/2010. Supreme Court Number: 09-9000. [10-70002] (CAV)
05/26/2010	SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellant Mr. Henry W Skinner in 10-70002 on 05/24/2010. [6543806-1] [10-70002] (CAV)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

HENRY WATKINS SKINNER, **Plaintiff,** **vs.** **LYNN SWITZER, District Attorney for the 31st Judicial District of Texas,** **Defendant.**	)	**Civil Action No. 2:09-CV-___**

COMPLAINT

(Filed Nov. 27, 2009)

1. Plaintiff Henry Watkins Skinner is scheduled to be executed by the State of Texas on February 24, 2010. The State intends to carry out this sentence in spite of the fact that there is a substantial amount of DNA evidence that has never been tested and could prove Plaintiff's innocence. This suit is brought to enjoin Defendant Lynn Switzer, the District Attorney for Gray County, Texas, from violating Plaintiff's federal constitutional rights by denying him access to that evidence for purposes of forensic DNA testing.

2. Defendant's refusal to release the biological evidence for testing violates Plaintiff's Fourteenth Amendment right to due process and his Eighth Amendment right to be free from cruel and unusual punishment. Plaintiff requests of this Court an order declaring that Defendant's continued withholding of

the evidence violates Plaintiff's constitutional rights and requiring that Defendant release the evidence to Plaintiff under a reasonable protocol regarding chain of custody and preservation of the evidence, in order that Plaintiff can have the evidence tested at his own expense.

I. JURISDICTION

3. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343, 1651, 2201, and 2202, and under 42 U.S.C. § 1983.

II. VENUE

4. Venue lies in this Court under 28 U.S.C. § 1391 because the Defendant resides in the Northern District of Texas.

III. PARTIES

5. Plaintiff is currently incarcerated, under a sentence of death imposed by the 31st Judicial District Court of Texas (the "31st District Court"), at the Polunsky Unit of the Texas Department of Criminal Justice in Livingston, Texas. He is scheduled to be executed on February 24, 2010.

6. Defendant Lynn Switzer is the District Attorney for the 31st Judicial District of Texas, and maintains an office in that district in the city of Pampa. She is being sued in her official capacity.

Defendant Switzer has custody and control of the DNA evidence that is the subject of this case.

IV. PROCEDURAL BACKGROUND

7. In 1995, Plaintiff was convicted and sentenced to death by a jury in the 31st District Court for the murders of his girlfriend Twila Busby and her sons Elwin Caler and Randy Busby. The conviction and sentence were upheld by the Texas Court of Criminal Appeals ("CCA") on direct appeal. *Skinner v. State,* 956 S.W.2d 532 (Tex. Crim. App. 1997), *cert. denied,* 523 U.S. 1079 (1998).

8. On March 26, 1998, Plaintiff initiated state court habeas corpus proceedings pursuant to Art. 11.071 V.A.C.C.P. Plaintiff's efforts to obtain post-conviction relief from the state courts were ultimately dismissed on procedural grounds.

9. Plaintiff filed a petition for writ of habeas corpus with this Court on February 4, 1999. That petition was ultimately denied on February 22, 2007. *Skinner v. Quarterman,* No. 2:99-CV-0045, 2007 WL 582808 (N.D. Tex. Feb. 22, 2007) (not designated for publication). On May 14, 2008, the United States Court of Appeals for the Fifth Circuit granted a certificate of appealability on two issues relating to Plaintiff's claim that he was denied effective assistance of counsel at the guilt phase of his trial. *Skinner v. Quarterman,* 528 F.3d 336 (5th Cir. 2008). However, after receiving additional briefing, the Fifth Circuit on July 14, 2009 affirmed this Court's denial

of the writ of habeas corpus. *Skinner v. Quarterman*, 576 F.3d 214 (5th Cir. 2009). On November 25, 2009, Plaintiff filed a petition for a writ of certiorari with the Supreme Court of the United States, seeking review of the Fifth Circuit's judgment. A ruling on that petition is pending.

10. On October 20, 2009, without giving Plaintiff's attorneys any notice or an opportunity to be heard, the 31st District Court entered an order directing that Plaintiff be executed by intravenous injection "at any time after the hour of 6:00 p.m. on the 24th day of February, 2010."

V. DNA TESTING PERFORMED BY THE STATE

11. The evidence presented at trial showed that Twila Busby was strangled by her assailant and then beaten repeatedly with an ax handle found at the scene, that Elwin Caler received multiple stab wounds to his chest, and that Randy Busby was stabbed repeatedly in the back. The evidence also showed that at some point around the time of the murders, Plaintiff sustained a cut to his hand. As a result of these multiple injuries, copious blood stains and other biological evidence were found by the police throughout the house in which the murders occurred.

12. The State chose to conduct DNA testing prior to trial on only four items. At trial, the State's DNA expert testified that swaths cut from Plaintiff's shirt contained both Twila Busby's and Plaintiff's

blood and swaths cut from the pants contained blood from Twila Busby, Elwin Caler and Plaintiff. She also testified that the blood on the blanket was that of Randy Busby, the hair on his body was also his, and the hair on the blanket belonged to Elwin Caler. These results tend to show that Plaintiff came in contact with Twila Busby and Elwin Caler after they were injured. They do not indicate how that contact occurred and do not show that Plaintiff inflicted their injuries.

13. No evidence submitted at trial proved conclusively that Plaintiff committed the murders. His conviction was based primarily on the circumstantial evidence that Plaintiff was present in the house at the time the murders occurred, that he had the blood of two of the victims on his clothes, and that he supposedly told a neighbor, Andrea Reed, shortly after the murders that he might have "kicked" Twila Busby to death. There was no evidence, however, that Twila Busby was in fact kicked. The defense presented expert testimony that Plaintiff was too incapacitated from having consumed large quantities of alcohol and codeine, and had insufficient use of his right hand due to a prior injury, to have committed the crimes. The defense also asserted that the State, which had the burden of proof, had failed to test all of the evidence and had failed to investigate an alternative suspect, Twila Busby's uncle Robert Donnell. The evidence showed that Donnell had stalked Twila Busby at a New Year's Eve party shortly before the murders,

and his whereabouts at the time of the murders were never explained.

14. In 2000, former District Attorney John Mann, responding to questions raised in the media regarding Plaintiff's possible innocence, decided to have additional DNA material tested. Ignoring repeated requests by Plaintiff's post-conviction counsel to participate in the testing process to insure its validity, Mann unilaterally arranged for GeneScreen, a private laboratory in Dallas, Texas, to test certain additional items selected by Mann. Once again, the items selected did not include all the available DNA evidence.

15. GeneScreen reported its results to the District Attorney in four separate reports. The first, dated August 24, 2000, reported as follows:

> Twila Busby is included as a contributor of the profile obtained from the blood on the cover of the blue notebook, the hair from the back of Twila Busby, the hair from the left hand of Twila Busby, and the hair from the ax handle. Henry Watkins Skinner is included as a contributor to the profile from the cigarette butt. Twila Busby and Henry Watkins Skinner are included as contributors to the mixed profile from the hair from the right hand of Twila Busby. The profile from the gauze with bloodstain is from an unknown male individual. The profile of the cassette tape with blood is a mixture of two unknown individuals. No conclusion could be reached concerning the hair from the living

> room, the hair from the abdomen of Twila Busby, the hair from the cassette tape, and the hair from the back bedroom door.

16. The second GeneScreen report, dated September 20, 2000, solely addressed additional testing performed on blood flakes on the hair found in Twila Busby's right hand. It concluded that Twila Busby herself was the contributor of that blood.

17. The third GeneScreen report, dated October 4, 2000, was identical to the first report except that it added an additional paragraph describing the likelihood that the mixed profile of the DNA found on the hair from Twila Busby's right hand was from Twila and Plaintiff, as opposed to the possibility that someone other than Plaintiff was the second contributor.

18. Because the GeneScreen testing performed up to this point had been incapable of determining the source of the hair shafts themselves, John Mann asked GeneScreen to subject those hairs to mitochondrial testing, a form of analysis that examines the mitochondria within the cells of the hair shaft. The fourth and final GeneScreen report, dated February 6, 2001 – after Mann had left office – contradicted Mann's assertion that the hairs themselves came from Plaintiff. Specifically, the final GeneScreen report reached the following conclusions:

> Based on the results of this testing, the mitochondrial DNA (mtDNA) sequence obtained from the #1 hair from the victim's right hand, hair samples from T. Busby, the

> #5 hair from the paper towel around the cassette tape, the #1 hair on the tape found on back bedroom door and the #2 hair on the tape found on back bedroom door are consistent with the profile from the known blood sample from the victim Twila Busby. Neither Twila Busby nor a maternal relative of Twila Busby can be excluded as the potential contributor of these hairs. This profile is unique in the FBI database of 4052 individuals.
>
> Henry Watkins Skinner is excluded as a potential contributor to these hairs. The profile from the hair from the living room and the #2 hair from the victim's right hand was inconclusive.

Robert Donnell, the brother of Twila Busby's mother, was a "maternal relative" of Twila Busby.

19. The GeneScreen testing raised more questions than it answered. For example, while the August 24, 2000 and the October 4, 2000 reports conclude that Twila Busby and Plaintiff were both contributors to a "mixed genetic profile" taken from a hair in Twila Busby's right hand, they also indicate that the markers found in this material matching Twila's DNA profile were strong but those matching Plaintiff's were "faint." In neither of these two reports was the nature of the material found on the hair disclosed, but apparently it was not blood because, in the September 20, 2000 [report], GeneScreen indicated that "blood flakes" taken from this same hair came solely from Twila Busby and that the genetic markers in these blood flakes were

inconsistent with Plaintiff's DNA. And the February 6, 2001, report concluded that *one* of the hairs found in Twila's right hand was her own, and test results on a *second* hair found in her hand were inconclusive. The February 6 report is the first to indicate that more than one hair was found in Twila's right hand, but is silent on whether either of the hairs tested mitochondrially was the same as the hair from which DNA material had been obtained for the testing reported on in the earlier reports.

20. GeneScreen did not test all the DNA material Mann sent to have tested. For example, although GeneScreen was provided with the "Dalchem" rape kit specifically used to collect DNA material from Twila Busby's vagina during her autopsy, no results from any DNA testing of the vaginal swabs appears in GeneScreen's reports. Similarly, GeneScreen was provided with Twila Busby's fingernail clippings, but no test results from this material appear in the reports.

21. GeneScreen was *not* provided with several additional items that could yield important results. For example, Mann sent to GeneScreen known DNA samples from only Twila Busby and Plaintiff. No comparison was made to the known DNA of the other two victims, Randy Busby and Elwin Caler, or to the DNA of other possible suspects. Nor was GeneScreen provided the two knives found at the scene (one or both of which were almost surely used to stab Elwin Caler and Randy Busby). Nor was GeneScreen provided a bloody dish towel and a man's jacket

containing hairs, blood and perspiration, both of which were found near Twila Busby's body.

VI. PLAINTIFF'S EFFORTS TO OBTAIN DNA TESTING

Plaintiff has attempted on numerous occasions to obtain testing of DNA material and in each instance was refused relief. The first of those attempts was in 2000, when Plaintiff's counsel asked District Attorney Mann for the opportunity to participate on a joint basis with the testing that Mann unilaterally initiated with GeneScreen. In early 2001, Mann's successor, Richard Roach, met with Plaintiff's counsel to consider voluntary testing of the remaining DNA evidence but ultimately declined the request.

22. In 2001, the Texas legislature amended Art. 64 of the Texas Code of Criminal Procedure to provide a procedure for Texas inmates to obtain post-conviction DNA testing. Shortly after that law took effect, on October 9, 2001, Plaintiff filed a motion (the "First Motion") with the 31st District Court asking for DNA testing of the following items:

1) vaginal swabs from Twila Busby contained in the Dalchem rape kit,
2) Twila Busby's fingernail clippings,
3) any biological material on a knife found on the front porch of Twila Busby's house,

4) any biological material on a knife found in a plastic bag in the living room,

5) any biological material on the dish towel, and

6) the blood and hairs on the jacket found next to Ms. Busby's body.

23. The First Motion was ultimately denied by the 31st District Court, and Plaintiff appealed to the CCA. On September 10, 2003, the CCA issued a decision affirming the lower court on the ground that Plaintiff had failed to satisfy the requirements of Art. 64.03(a)(2)(A), which required that the convicted person establish by a preponderance of the evidence a reasonable probability that he would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing. The court concluded that the GeneScreen results were so inculpatory that they could never be overcome by exculpatory results on the items Plaintiff asked to have tested:

> Analysis of blood flakes found on a piece of hair collected from Busby's right hand during the autopsy tested positive for a contribution of the appellant's DNA and Busby's DNA. This analysis demonstrates the intermingling of the victim's and the appellant's DNA *during the time when she was struggling for her life*. Because the appellant's DNA was found mixed with Busby's DNA in her hand during the autopsy, there is nothing about the other items found at the crime scene that, if linked to a third person, would

> cast doubt on the appellant's presence at the scene of Busby's death or the appellant's involvement in the offense. Given this evidence, the presence of a third party's DNA at the crime scene would not constitute affirmative evidence of innocence.

24. On September 25, 2003, Plaintiff moved for rehearing of this decision, on three grounds: (1) the Court was wrong in concluding that the blood flakes on the hair in Twila Busby's right hand were a mixed profile; (2) the Court was wrong in concluding that, *a fortiori,* the intermingling had occurred "during the time [Twila] was struggling for her life"; and (3) the Court was wrong in relying on the GeneScreen reports at all, because they had never been subjected to scrutiny in an adversarial proceeding or accepted as reliable under Texas Rules of Evidence 705(b) and (c).

25. On December 10, 2003, the CCA issued a new opinion that was identical to its September 10, 2003, opinion except for the paragraph regarding the GeneScreen test results quoted above. In the revised opinion, that paragraph was changed to read as follows:

> The GeneScreen reports indicate that Twila and the appellant "are included as contributors to the mixed profile from the hair from the right hand of Twila Busby." This analysis demonstrates the intermingling of the victim's and the appellant's DNA, *probably* during the time when she was

> struggling for her life. Because the appellant's DNA was found mixed with Busby's DNA in her right hand during the autopsy, there is nothing about the other items found at the crime scene that, if linked to a third person, would cast doubt on the appellant's presence at the scene of Busby's death or the appellant's involvement in the offense. Given this evidence *and the other evidence detailed above,* the presence of a third party's DNA at the crime scene would not constitute affirmative evidence of innocence.

Skinner v. State, 122 S.W.3d 808, 811 (Tex. Crim. App. 2003) (emphasis added). The revised opinion ignored Plaintiff's objection to reliance on the GeneScreen reports at all, given that they had never been subjected to scrutiny in the adversarial process.

26. Plaintiff's next effort to obtain DNA testing was in this Court, in connection with his federal habeas petition. Plaintiff filed a motion contending that DNA testing was necessary in order for Plaintiff to prove that he had been prejudiced by his counsel's failure to ask for the testing prior to trial. On May 18, 2004, Magistrate Judge Averitte granted production of GeneScreen documents relating to its 2000-01 testing but, without explanation, denied the request for further testing. On August 15, 2005, after reviewing the GeneScreen documents and consulting with his own DNA experts, Plaintiff renewed his motion for DNA testing. On October 4, 2005, Magistrate Judge Averitte again denied the request but left open the possibility that Plaintiff could "reurge" the motion

if Plaintiff were able to demonstrate at the November 2005 evidentiary hearing that trial counsel had been deficient in failing to seek DNA testing prior to trial.

27. At the November 2005 evidentiary hearing in the habeas case, Magistrate Judge Averitte allowed the parties to submit evidence limited to Gene-Screen's conclusion, in its February 6, 2001 report, that the results of the mitochondrial testing of the second of the hairs clutched in Twila Busby's right hand were "inconclusive." Plaintiffs expert testified that the results of the testing on the second hair, while inconclusive in the sense that they could not be used to identify a particular person as the source of that hair, were nevertheless sufficient to determine that Twila Busby could conclusively be excluded as the source of the second hair and that Plaintiff more likely than not could be excluded. The State's witness, who had performed the mitochondrial DNA testing on that hair while employed at GeneScreen in 2000-01, defended his decision to report the results as inconclusive. This Court ultimately did not resolve the dispute between the experts on this point, or rule on Plaintiff's motion for further DNA testing, because it concluded that trial counsel had not performed deficiently in failing to request DNA testing.

28. On July 30, 2007, Plaintiff filed a second motion for DNA testing (the "Second Motion") with the 31st District Court, citing certain new developments since the CCA's decision on the First Motion that warranted a different result. Shortly after the Second Motion was filed, Plaintiff's counsel telephoned

Defendant Switzer, who by then had succeeded Roach as District Attorney, and requested that she voluntarily provide the requested DNA evidence for testing, pursuant to a protocol for handling the evidence to which the parties would agree. Defendant denied that request.

29. Art. 64.02(a)(2) requires that, when a motion for DNA testing is filed, the attorney representing the State either (A) deliver the evidence sought to be tested to the court, along with a description of the condition of the evidence, or (B) explain in writing why the State cannot deliver the evidence. Defendant Switzer, who represented the State in connection with the Second Motion, informed the court that, "[t]o the best of the State's information, knowledge and belief, the items sought to be tested are still available for testing, the chain of custody is intact, and the items are in a condition to be tested although the State has not sought expert opinion in that regard."

30. On December 7, 2007, the 31st District Court denied the Second Motion[.] On appeal, the CCA affirmed, relying only on the ground that Plaintiff had failed to meet the "no-fault-of-the-convicted-person" requirement of Art. 64.01(b)(1)(B). That section requires a convicted person requesting testing that was available at the time of trial to show that the testing was not previously performed "through no fault of the convicted person, for reasons that are of a nature such that the interests of justice require DNA testing." The CCA interpreted this section as barring DNA testing altogether for any

convicted person who had declined to seek DNA testing prior to trial as a matter of legal strategy:

> [I]f trial counsel declined to seek testing as a matter of reasonable trial strategy, then post-trial testing would not usually be required by the interests of justice. To hold otherwise would allow defendants to "lie behind the log" by failing to seek testing because of the reasonable fear that the results would be incriminating at trial but then seeking testing after conviction when there is no longer anything to lose.

Skinner v. State, 293 S.W.3d 196, 202 (Tex. Crim. App. 2009).

31. As a result of the decisions of the CCA denying Plaintiff post-conviction DNA testing under Art. 64, the Defendant has refused and continues to refuse to make available to Plaintiff any DNA material for testing. Her most recent refusal was in a telephone conference with Plaintiff's counsel on November 25, 2009.

VII. FIRST CLAIM FOR RELIEF – DENIAL OF DUE PROCESS

32. Plaintiff realleges and incorporates herein by reference the allegations contained in all the preceding paragraphs of this Complaint.

33. By refusing to release the biological evidence for testing, and thereby preventing Plaintiff from gaining access to exculpatory evidence that

could demonstrate he is not guilty of capital murder, Defendant has deprived Plaintiff of his liberty interests in utilizing state procedures to obtain reversal of his conviction and/or to obtain a pardon or reduction of his sentence, all in violation of his right to Due Process of Law under the Fourteenth Amendment to the Constitution of the United States.

VIII. SECOND CLAIM FOR RELIEF – CRUEL AND UNUSUAL PUNISHMENT

34. Plaintiff realleges and incorporates herein by reference the allegations contained in all the preceding paragraphs of this Complaint.

35. By refusing to release the biological evidence for testing, and thereby preventing Plaintiff from gaining access to exculpatory evidence that could demonstrate he is not guilty of capital murder, Defendant has deprived Plaintiff of his liberty interests in utilizing state procedures to obtain reversal of his conviction and/or to obtain a pardon or reduction of his sentence, all in violation of his right to be free from Cruel and Unusual Punishment under the Eighth Amendment to the Constitution of the United States.

IX. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court provide relief as follows:

36. A declaratory judgment that Plaintiff is entitled to access to the following evidence for DNA testing at Plaintiff's expense:

a. vaginal swabs taken from Twila Busby at the time of her autopsy;

b. Twila Busby's fingernail clippings;

c. the knife found on the front porch of the house where the murders occurred;

d. the knife found in a plastic bag in the living room of said house;

e. the dish towel also found in said plastic bag;

f. the windbreaker jacket found on the living room floor; and

g. any hairs found in Twila Busby's hands.

37. A preliminary and permanent injunction requiring Defendant to produce all the foregoing evidence to Plaintiff, pursuant to an appropriate protocol regarding chain of custody and preservation and return of the evidence.

38. Reasonable attorneys' fees, costs of suit and such other and further relief as this Court deems just and proper.

Respectfully submitted,

/s/ Robert C. Owen

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Counsel for Plaintiff

Dated: November 27, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

HENRY WATKINS SKINNER, §
§
Plaintiff, §
§
vs. §
§ 2:09-CV-0281
LYNN SWITZER, §
District Attorney, §
31st Judicial District of Texas, §
§
Defendant. §
§

REPORT AND RECOMMENDATION TO GRANT DEFENDANT'S MOTION TO DISMISS AND TO DISMISS § 1983 COMPLAINT

(Filed Jan. 15, 2010)

Before the Court is plaintiff's complaint, alleging a cause of action under Title 42 U.S.C. § 1983 and asserting that defendant's refusal to allow him access to biological evidence for purposes of forensic DNA testing violates his Fourteenth Amendment right to due process and his Eighth Amendment right to be free from cruel and unusual punishment. For the reasons set forth, the undersigned recommends to the United States District Judge that defendant's motion to dismiss be GRANTED and that plaintiff's complaint be DISMISSED.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, defendant, and the Court of Criminal Appeals have adequately set forth the procedural background of this case. *See Skinner v. State,* 956 S.W.2d 532 (Tex. Crim. App. 1997); (*Complaint,* document #1, cause 2:09-CV-281, filed by plaintiff on Nov. 27, 2009; *Motion to Dismiss,* document #28, cause 2:09-CV-281, filed by defendant on Dec. 29, 2009). For the purposes of these findings, conclusions, and recommendation, however, the following summation is provided.

Plaintiff Henry Skinner was convicted in the 31st District Court of Gray County, Texas, of the offense of capital murder as a result of his having committed multiple murders during one criminal episode. The jury sentenced plaintiff to death. He is currently scheduled to be executed by the State of Texas on February 24, 2010.

Because of procedural issues not relevant to this § 1983 proceeding, the merits of Skinner's state habeas claims were never addressed during state habeas corpus proceedings. Skinner did present claims in a federal habeas corpus action filed in this Court, which resulted in a determination that his conviction and death sentence were constitutional and federal habeas corpus relief was denied. *See Skinner v. Dretke,* cause 2:99-CV-45 (judgment issued Feb. 22, 2007). The Fifth Circuit Court of Appeals affirmed this Court's denial of federal habeas corpus relief. *See Skinner v. Quarterman,* 576 F.3d 214 (5th Cir. 2009). Plaintiff filed a petition for a writ of certiorari in the case on November 23, 2009, which is pending before the Supreme Court.

By this lawsuit, plaintiff seeks, for purposes of conducting DNA testing, access to biological evidence recovered from the scene of the murders and never before tested. Although the evidence has not been previously tested, it is not newly discovered evidence, but was available to plaintiff at the time of trial. Plaintiff does not contend the results of any DNA testing would in fact be exculpatory, but contends the results might be exculpatory. In seeking this evidence post-conviction, plaintiff filed two motions in Texas courts, in 2001 and in 2007, for DNA evidence pursuant to Article 64.01 of the Texas Code of Criminal Procedure. The state trial court denied both of those motions, and the Texas Court of Criminal Appeals (CCA) affirmed both denials. *See Skinner v. State,* 293 S.W.3d 196 (Tex. Crim. App. 2009); *Skinner v. State,* 122 S.W.3d 808 (Tex. Crim. App. 2003). Plaintiff did not seek relief from either of the CCA's denials of the Article 64.01 motions by petitioning the United States Supreme Court for a writ of certiorari.

II.

THE ALLEGATIONS

By his complaint, plaintiff asks the Court to require defendant to release certain items of biological evidence for DNA testing. Plaintiff alleges he is entitled to obtain certain biological evidence, which he lists with specificity, for DNA testing and that the withholding of the evidence violates his due process rights under the Fourteenth Amendment and his right to be free from cruel and unusual punishment under the Eighth Amendment to the United State[s] Constitution. Less than one month after filing his complaint and motion for preliminary injunction, plaintiff filed a Notice of Recent Relevant Authority, in which he acknowledged relevant Fifth Circuit caselaw that appears to require this Court to dismiss plaintiff's complaint for failing to raise a cognizable § 1983 claim. *(Plaintiff's Notice of Recent Relevant Authority,* document # 23, cause 2:09-CV-281, filed by plaintiff on December 22, 2009). By his Notice, plaintiff suggests the Court dismiss the case pursuant to the screening provisions of the Prison Litigation Reform Act.

In response to the complaint, defendant has filed a motion to dismiss, urging four grounds for dismissal:

1. The Court lacks subject matter jurisdiction under the *Rooker-Feldman* doctrine to rule on plaintiff's claims and should therefore dismiss the complaint under rule 12(b)(1) of the Federal Rules of Civil Procedure;
2. The Court is bound by *Heck v. Humphrey,* 512 U.S. 475, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994) as interpreted in *Kutzner v. Montgomery County,* 303 F.3d

339 (5th Cir. 2002) and should therefore dismiss the complaint under rule 12(b)(6) of the Federal Rules of Civil Procedure;

3. Plaintiff's complaint presents claims that are essentially identical to several prior claims decided against plaintiff at the state and federal levels and should therefore be dismissed pursuant to 28 U.S.C. § 1738; and
4. The complaint is in essence an improper, successive petition for habeas corpus relief and should therefore be dismissed pursuant to 28 U.S.C. § 2244(b)(3-4).

III.

JURISDICTION

Notwithstanding plaintiff's notice of Recent Relevant Authority, this Court must, prior to discussing the merits of the case, determine if it has jurisdiction. *Lance v. Coffman,* 549 U.S. 437, 438, 127 S. Ct. 1194, 1196, 167 L. Ed. 2d 29 (2007). Defendant contends the *Rooker-Feldman* doctrine precludes this Court from obtaining jurisdiction over this case. That doctrine bars federal district courts from exercising "appellate jurisdiction over state-court judgments, which Congress has reserved to [the Supreme] Court." *Verizon Md., Inc. v[.] Pub. Serv. Com'n of Md.,* 535 U.S. 635, 644 n. 3, 122 S. Ct. 1753, 1759, 152 L. Ed. 2d 871 (2002). The Court clarified the scope of the doctrine in *Exxon Mobil Corp. v.*

Saudi Basic Indus. Corp., 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005). In that case, the Court established "[t]he *Rooker-Feldman* doctrine . . . is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 284, 125 S. Ct. at 1521-22.

Research has not uncovered any Fifth Circuit guidance directly on point. The Second Circuit, however, has discussed *Rooker-Feldman* in the context of a case where a prisoner sought access to DNA evidence via a § 1983 claim. *See McKithen v. Brown*[,] 481 F.3d 89 (2d Cir[.] 2007).

In that case, the court, relying on *Exxon,* determined the state-court decision denying plaintiff access to DNA evidence did not *cause* injury to constitutional rights. *Id.* at 98. Rather, the injury existed before the state court entered its judgment and was "simply ratified, acquiesced in, or left unpunished by the state court." *Id.* (internal quotation omitted).

The Sixth Circuit, however, in evaluating a factually similar situation, reached a different conclusion. In *In re Smith,* an unpublished decision, the court, likewise relying on *Exxon,* held a § 1983 plaintiff was barred by the *Rooker-Feldman* doctrine from seeking DNA evidence. No. 07-1220, 2009 WL 3049202 at * 3 (6th Cir. Sept. 24, 2009). The plaintiff in *In re Smith* complained the *state trial court* incorrectly denied his motions for access to DNA evidence. *Id.* The Sixth Circuit concluded this was a complaint of an injury caused by the state-court judgment and which sought review and rejection of that judgment, and, as such, was barred by *Rooker-Feldman*. *Id.*

Plaintiff's claims for relief are limited to those asserted in his complaint and the only causes of action asserted in his complaint are that defendant Switzer violated his Fourteenth and Eighth Amendment rights. The issue is made more difficult, however, because it is not clear from plaintiff's pleadings whether he is attempting to assert other claims. It may be that plaintiff is attempting to assert at least two different theories of relief: (1) that defendant's actions violated his constitutional rights (as contained in his complaint) and (2) that the state court's actions in applying the state DNA testing statute violated his constitutional rights (not asserted in his complaint). The first of these claims is similar to those in *McKithen,* while the second is more similar to those in *In re Smith*. As such, the first of these claims is not barred by the *Rooker-Feldman* doctrine, but the second, if in fact it is being asserted, very well may be barred.

A. Issues Not Precluded by the Rooker-Feldman Doctrine

"A claim which is not raised in the complaint . . . is not properly before the court." *Cutrera v. Bd. of Supervisors,* 429 F.3d 108, 113 (5th Cir. 2005). Thus, the Court's analysis must begin with and is determined by the particular causes of action plaintiff brings in his complaint. In his complaint, plaintiff identified two causes of action, *i.e.*, that defendant deprived plaintiff of (1) his right to due process of law under the Fourteenth Amendment and (2) his right to be free from cruel and unusual punishment under the Eighth Amendment. *(Complaint,* document #1, ¶¶ 33, 35, cause 2:09-CV-281, filed by plaintiff on Nov. 27, 2009). Critically, plaintiff's *complaint* does not challenge the constitutionality of Article 64 of the Texas Code of Criminal Procedure nor does it ask this Court to review the application of Article 64 by the CCA's judgments denying him access to the DNA evidence. While plaintiff does, in various other pleadings, complain about the decisions of the CCA, he has not set out a specific cause of action challenging those decisions, as discussed in detail *infra.*[1]

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[1] In fact, plaintiff, at page 3 of plaintiff's response to defendant's motion to dismiss, he affirmatively states that he does not complain of injuries caused by any state court judgment. *(Plaintiff's Response to Defendant's Motion to Dismiss,* pg. 3, document #37, cause 2:09-CV-281, filed by plaintiff on January 6, 2010). At page 4, plaintiff against [sic] reiterates that the injury of which he complains, that is, the refusal of the defendant district attorney to provide access to DNA evidence,

(Continued on following page)

Any injuries caused by defendant's refusal to release DNA evidence predate and are not caused by the CCA's decisions to not grant plaintiff access to the biological evidence. As in the *McKithen* case, the state-court decision denying plaintiff access to the evidence did not, in fact, *cause* the injury of which plaintiff initially complains. *See McKithen,* 481 F.3d at 98. Moreover, plaintiff affirmatively disclaims he is claiming any injury caused by the state court judgment. *(See* plaintiff's response to defendant's motion to dismiss). Because plaintiff is not "complaining of injuries caused by [the] state-court judgment[ ]" and does not seek review of those judgments, review of the claims for relief set out in the complaint is not barred by *Rooker-Feldman*. *See Exxon Mobil Corp.,* 544 U.S. at 284, 125 S. Ct. at 1521-22.

B. Issues Likely Precluded by the *Rooker-Feldman* Doctrine

Ordinarily, the Court would not address claims which the plaintiff has not properly pled. As set forth above, the undersigned finds plaintiff to only have alleged those causes of action set out at paragraphs

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existed prior to the state court proceedings and, therefore, his injury could not have been caused by those proceedings. (*Id.*, pg. 4). At page 6 of his response, plaintiff states that he "in no way" requests this Court to review or reject any state court judgments and further states that whether the state court judgments are valid or invalid, his constitutionally protected rights were violated by defendant's refusal to provide access to the requested evidence. (*Id.*, pg. 6).

VII and VIII of his complaint. Since these findings, conclusions, and recommendations will be subject to review by the District Judge, the undersigned has included a review of the additional arguments plaintiff has set out in his pleadings even though such claims were not identified as specific claims for relief. The reasoning in *In re Smith* would seem to apply to the arguments plaintiff makes that the state court's actions in applying the state DNA testing statute violated his constitutional rights. In his Response to Defendant's Motion to Dismiss, plaintiff contends Article 64 of the Texas Code of Criminal Procedure is unconstitutional *as applied* to his case. (*Plaintiff's Response to Defendant's Motion to Dismiss,* pgs. 9, 13, document #37, cause 2:09-CV-281, filed by plaintiff on January 6, 2010). These allegations appear to directly challenge the state court action, and by making them, plaintiff includes an argument that the *Texas Court of Criminal Appeals* violated his due process rights by incorrectly applying the state statute. By directly pointing to a state court's actions as a source of injury, and by asking the Court to review such state court actions, plaintiff raises claims likely barred by *Rooker-Feldman. See Exxon Mobil Corp.,* 544 U.S. at 284, 125 S. Ct. at 1521-22. If the CCA did indeed incorrectly and unconstitutionally apply Article 64 of the Texas Code of Criminal Procedure, the proper relief for plaintiff would have been to appeal the judgment directly to the United States Supreme Court.

Those claims, however, are not further addressed because plaintiff has not raised them as a claim for relief and has not sought to amend his complaint to assert them. For purposes of this Report and Recommendation, the undersigned finds no such claims to be asserted. *See Cutrera,* 426 F.3d at 113.

The undersigned also finds that paragraph 31 of the complaint, in which plaintiff states "[a]s a result of the decisions of the CCA denying Plaintiff post-conviction DNA testing under Art. 64, the Defendant has refused and continues to refuse to make available to Plaintiff any DNA material for testing," not to state an additional cause of action or claim for relief. (*Complaint,* document #1, ¶ 31, cause 2:09-CV-281, filed by plaintiff on Nov. 27, 2009). The Court notes this paragraph is not under the paragraphs plaintiff identifies in his complaint as claims for relief. (Paragraphs VII and VIII). Moreover, paragraph 31 appears merely to be a chronological statement that defendant has continually refused to release this evidence both before and following the CCA's denial of plaintiff's Article 64 motions. To the extent plaintiff contends otherwise, the Court does not believe this singular, vague statement can properly be read as directly challenging the CCA's decisions because if it were so read, plaintiff would be taking mutually exclusive positions, [*i.e.*] as set forth in footnote 1, plaintiff, in response to the motion to dismiss, affirmatively states the injury of which he complains existed prior to any state court decision and that he does not complain of injuries caused by a state court judgment.

Consequently, if the undersigned is correct in the determination of the claims presented, no *Rooker-Feldman* bar is present. If, however, the undersigned is incorrect and plaintiff is asserting any additional claims that the application of Article 64 by the CCA deprived him of due process, then it would appear he is complaining of an injury caused by the state court judgment and defendant's motion to dismiss based upon the *Rooker-Feldman* doctrine has considerable merit and the issue would have to be revisited. At this stage, plaintiff has not formally asserted these other claims in his complaint as causes of action and the Court will not further address plaintiff's contention regarding the improper application of Article 64 by the Texas courts.

IV.

Application of *Kutzner*

Defendant next contends plaintiff fails to state a claim upon which relief may be granted. Citing the *Kutzner* decision, issued by the Fifth Circuit in 2002, defendant contends plaintiff's claims are not cognizable under § 1983 and must be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Plaintiff agrees the *Kutzner* decision is binding upon this Court. *(Plaintiff's Notice of Recent Relevant Authority,* document # 23, cause 2:09-CV-281, filed by plaintiff on December 22, 2009).

In *Heck v. Humphrey,* the Supreme Court emphasized that a petition for a writ of habeas corpus is the exclusive remedy for a state prisoner challenging the fact or duration of his confinement. 512 U.S. 481, 114 S. Ct. at 2369. In evaluating § 1983 suits, the Court instructed district courts to "consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; it if [sic] would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 487, 114 S. Ct. at 2372.

Thereafter, the Fifth Circuit evaluated a § 1983 claim seeking to compel the production of biological evidence for DNA testing. *See Kutzner,* 303 F.3d at 340. In that case, the plaintiff contended that state officials refused to release biological evidence for DNA testing and thereby prevented him "from gaining access to exculpatory evidence which could exclude him as a perpetrator" of the offense for which he was convicted. *Id.* at 340. Applying *Heck,* the court held such a claim was not cognizable in a § 1983 action. Rather, the court pointed to 28 U.S.C. § 2254 as the proper statute for bringing such a claim:

> claims seeking to attack the fact or duration of confinement, as well as claims which are "so intertwined" with attacks on confinement that their success would "necessarily imply" revocation or modification of confinement, must be brought as habeas corpus petitions and not under § 1983. *Martinez v. Texas Court of Criminal Appeals,* 292 F.3d 417, 423 (5th Cir. 2002). Under *Martinez,* a prisoner's request for DNA testing of evidence relevant

> to his prior conviction is "so intertwined" with the merits of the conviction as to require habeas corpus treatment.

Id. at 341.

Three years after the *Kutzner* opinion, the Supreme Court issued *Wilkinson v. Dotson,* 544 U.S. 74, 125 S. Ct. 1242, 161 L. Ed. 2d 253 (2005). In that case, the Court evaluated its caselaw regarding the difference between claims cognizable under § 1983 and claims cognizable in habeas corpus.

The *Dotson* court found the § 1983 action, involving parole proceedings, should be allowed to proceed as a § 1983 action. *See id.* Although *Dotson* did not involve a request for evidence for DNA testing, circuit court[s] of appeals have interpreted the language in *Dotson* to allow a prisoner to bring a claim for biological evidence for DNA testing as a § 1983 claim, as opposed to the Fifth Circuit's approach requiring a prisoner to bring such a claim as a habeas corpus petition. *See McKithen v. Brown,* 481 F.3d 89, 103 (2d Cir. 2007) (holding "even if success for the plaintiff might well make it *more likely* that the plaintiff, in a subsequent proceeding, may eventually be able to make a showing that his conviction was unlawful and even if a plaintiff's ultimate motive is to challenge his conviction[,] a post-conviction claim for access to evidence is cognizable under § 1983" (internal citations omitted)); *Savory v. Lyons,* 469 F.3d 667 (7th Cir. 2006); *Osborne v. District Attorney's Office,* 423 F.3d 1050 (9th Cir. 2005), *rev'd on other grounds,* 129

S. Ct. 2308 (2009). Additionally, the Eleventh Circuit's position, established before *Dotson* was issued, is in agreement with that taken by the Second, Seventh, and Ninth Circuits. *See Bradley v. Pryor*, 305 F.3d 1287, 1292 (11th Cir. 2002) (holding a request for post-conviction DNA evidence may be brought under § 1983 because if a prisoner were successful in such a suit, "the conviction and sentence will not be called into question, since the only thing [the prisoner] will have secured is access to evidence").[2]

The Fifth Circuit has not ever discussed the *Dotson* decision in the context of its application to post-conviction requests for DNA evidence. It has, however, cited the *Kutzner* case after *Dotson* was decided in a case involving a post-conviction request for DNA evidence – indicating *Kutzner* remains the law in this circuit. *See Richards v. District Attorney's Office,* No. 09-10144, 2009 WL 4716025 at *2 (5th Cir. Dec. 10, 2009). Even were this Court to question the validity of *Kutzner* after *Dotson,* it recognizes that only the Fifth Circuit may overrule its own law, and even though there is an intervening Supreme Court decision in this case, there is also a latter Fifth Circuit decision. *See United States v. Short,* 181 F.3d 620, 623-24 (5th Cir. 1999) (noting that panels on the Fifth Circuit are bound by the precedent of previous panels).

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[2] In her Reply Brief in support of her motion to dismiss, defendant contends other courts appear to have sided, post-*Dotson*, with the Fifth Circuit's position in *Kutzner*. The cases cited by defendant, however, fail to discuss how post-conviction requests for DNA evidence should be brought (under 42 U.S.C. § 1983 or 28 U.S.C. §2254), which is the issue at the heart of *Kutzner*. *See Young v. Philadelphia County Dist. Attorney's Office*, no. 09-1668, 2009 WL 2445084 (3d Cir. Aug. 11, 2009) ("[Plaintiff] notes the circuit split over whether requests for post-conviction DNA testing are properly brought under § 1983 or in habeas proceedings. We have not yet answered this question, nor need we do so today."); *McDaniel v. Suthers*, No. 08-1400, 2009 WL 1784000 (10th Cir. June 24, 2009) (discussing the merits of a post-conviction request for DNA evidence brought in a § 1983 suit).

Based upon the foregoing, there is no reason not to apply *Kutzner.* In considering whether *Kutzner* applies, the undersigned notes that the Supreme Court expressly left the *Heck* issue open when it decided *Osborne,* 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009). In fact, the Supreme Court, while acknowledging that the Courts of Appeals had applied *Dotson* to allow § 1983 DNA lawsuits, specifically declined to address the issue of *Heck v. Humphrey.* It now appears the Fifth Circuit will address the viability of *Kutzner* in light of *Dotson* and *Osborne. (See Plaintiff's Notice of Recent Relevant Authority,* document # 23, cause 2:09-CV-281, filed by plaintiff on December 22, 2009).

This Court must follow the law established in *Kutzner* and hold that plaintiff Skinner's § 1983 claims are cognizable only in habeas corpus. *See Kutzner,* 303 F.3d at 341. As such, plaintiff fails to state a claim in his § 1983 complaint upon which relief may be granted and his complaint should be dismissed on such grounds.[3] Because the Court recommends the dismissal of the case for failure to state a claim upon which relief may be granted, it foregoes further discussion of other grounds for dismissal at this time.

Although the Court declines further discussion of other grounds for dismissal urged by the defendant, there are two issues which the undersigned identifies in the event the District Judge finds them to be cognizable. First, there is no freestanding substantive due process right to DNA evidence. *Osborne,* 129 S.Ct. at 2322-23. Were the District Judge to find *Kutzner* did not bar this lawsuit, then that issue would be presented as to any consideration of the merits.

Second, defendant's *res judicata* arguments have not been addressed. If the undersigned is correct in the determination that plaintiff's claims are limited to those identified in his complaint, then neither *res judicata* nor *Rooker-Feldman* bar the consideration of the case. If, however, plaintiff is in fact asserting the additional claims as discussed in section III of this

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[3] Plaintiff contends the Court should dismiss this case under 28 U.S.C. § 1915A, which requires a court to dismiss a case if, upon initial screening, the case fails to state a claim upon which relief may be granted. This case, however, in which defendant has filed responsive pleadings, plaintiff has answered such pleadings, and defendant has filed responses to plaintiff's answer, is clearly far beyond the screening stage, making § 1915A no longer applicable.

Report and Recommendation, *res judicata* would be an issue.

V.

RECOMMENDATION

It is the RECOMMENDATION of the United States Magistrate Judge to the United States District Judge that the 42 U.S.C. § 1983 [ ] filed by plaintiff HENRY WATKINS SKINNER be DISMISSED for failure to state a claim upon which relief may be granted and that the motion to dismiss filed by defendant LYNN SWITZER be GRANTED.

VI.

INSTRUCTIONS FOR SERVICE

The United States District Clerk is directed to send a copy of this Report and Recommendation to each party by the most efficient means available.

IT IS SO RECOMMENDED.

ENTERED this 15th day of January, 2010.

/s/ Clinton E Averitte
CLINTON E. AVERITTE
UNITED STATES
MAGISTRATE JUDGE

* NOTICE OF RIGHT TO OBJECT *

Any party may object to these proposed findings, conclusions and recommendation. In the event parties wish to object, they are hereby NOTIFIED that the deadline for filing objections is fourteen (14) days from the date of filing as indicated by the "entered" date directly above the signature line. Service is complete upon mailing, Fed. R. Civ. P. 5(b)(2)(C), or transmission by electronic means, Fed. R. Civ. P. 5(b)(2)(E). **Any objections must be filed on or before the fourteenth (14th) day after this recommendation is filed** as indicated by the "entered" date. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b)(2); *see also* Fed. R. Civ. P. 6(d). Plaintiff has requested the Court expedite its ruling in this case. If plaintiff wishes to file objections prior to the deadline, plaintiff should indicate no additional objections will be filed.

Any such objections shall be made in a written pleading entitled "Objections to the Report and Recommendation." Objecting parties shall file the written objections with the United States District Clerk and serve a copy of such objections on all other parties. A party's failure to timely file written objections to the proposed findings, conclusions, and recommendation contained in this report shall bar an aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings, legal conclusions, and recommendation set forth by the Magistrate Judge in this report and accepted by the district court. *See*

Douglass v. United Services Auto. Ass'n, 79 F.3d 1415, 1428-29 (5th Cir. 1996); *Rodriguez v. Bowen,* 857 F.2d 275, 276-77 (5th Cir. 1988).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

HENRY WATKINS SKINNER,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	2:09-CV-0281
LYNN SWITZER, District Attorney, 31st Judicial District of Texas,	§ § §	
Defendant.	§	

ORDER OVERRULING OBJECTIONS, ADOPTING REPORT AND RECOMMENDATION, GRANTING DEFENDANT'S MOTION TO DISMISS, and DISMISSING § 1983 COMPLAINT

(Filed Jan. 20, 2010)

Plaintiff HENRY WATKINS SKINNER has filed with this Court a cause of action under Title 42 U.S.C. § 1983. On January 15, 2010, the United States Magistrate Judge issued a Report and Recommendation in this cause, recommending therein that defendant's motion to dismiss be granted and plaintiff's complaint be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and *Kutzner v. Montgomery County,* 303 F.3d 339 (5th Cir. 2002). The same day the Report and Recommendation was issued, plaintiff filed objections to it, admitting that while the *Kutzner* [ ] and its progeny are binding upon this Court, the caselaw is incorrect in light of Supreme Court precedent. Plaintiff represents he intends to make no further objections before the expiration of the fourteen-day objection deadline.

The undersigned United States District Judge has made an independent examination of the record in this case and has considered the objections made by petitioner to the Report and Recommendation. The objections filed by petitioner are without merit and are hereby OVERRULED. The Magistrate Judge's Report and Recommendation is hereby ADOPTED. Defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is GRANTED, and the § 1983 complaint is DISMISSED.

IT IS SO ORDERED.

ENTERED this 20th day of January, 2010.

/s/ Mary Lou Robinson
MARY LOU ROBINSON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

HENRY WATKINS SKINNER,	§	
	§	
Plaintiff,	§	
	§	
vs	§	2:09-CV-0281
LYNN SWITZER, District Attorney, 31st Judicial District of Texas,	§ § §	
Defendant.	§	

JUDGMENT

(Filed Jan. 20, 2010)

Of equal date herewith, the undersigned United States District Judge has entered an Order adopting the Report and Recommendation issued by the United States Magistrate Judge and dismissing plaintiff's 42 U.S.C. § 1983 complaint.

JUDGMENT IS ENTERED ACCORDINGLY.

ENTERED this 20th day of January, 2010.

/s/ Mary Lou Robinson
MARY LOU ROBINSON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10-70002

HENRY W. SKINNER,

Plaintiff-Appellant,

versus

LYNN SWITZER,
District Attorney for the
31st Judicial District of Texas,

Defendant-Appellee.

Appeal from the United States District
Court for the Northern District of Texas
No. 2:09-CV-0281

(Filed Jan. 28, 2010)

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Henry Skinner, convicted of capital murder and sentenced to death,[2] appeals the dismissal of his complaint under 42 U.S.C. § 1983 in which he asserts that the defendant district attorney's refusal to allow him access to biological evidence for purposes of forensic DNA testing violates his Fourteenth Amendment right to due process and his Eighth Amendment right to be free from cruel and unusual punishment. The district court adopted the report and recommendation of the magistrate judge and granted defendant's motion to dismiss.

Execution is set for February 24, 2010. Skinner moves to expedite the appeal and proposes an expedited briefing schedule to which the defendant does not object. In his motion, Skinner acknowledges that the law of this circuit is contrary to the position taken in his complaint; he refers specifically to the binding authority of *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir. 2002), and to the unpublished but persuasive opinion in *Richards v. District Attorney's Office*, No. 09-10144, 2009 U.S. App. LEXIS 26947 (5th Cir. Dec. 10, 2009) (per curiam) (unpublished). In both of those cases, this court held that an action by a prisoner for post-conviction DNA testing is not cognizable under § 1983 and must instead be brought as a petition for writ of habeas corpus.

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[2] *See Skinner v. Quarterman*, 576 F.3d 214 (5th Cir. 2009), *petition for cert. filed* (Nov. 23, 2009) (No. 09-7784).

Skinner suggests that, as an alternative to receiving full briefing on an expedited basis, this court can dispose of the appeal on the basis of *Kutzner* and *Richards*. This would allow Skinner to seek relief expeditiously in the Supreme Court in light of the scheduled execution.

We agree with that suggestion. The judgment is AFFIRMED. The motion to expedite the appeal is DENIED as unnecessary. The mandate shall issue forthwith.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

May 24, 2010

Mr. Robert C. Owen
School of Law, University of Texas
Austin, TX 78704

Re: Henry W. Skinner
v. Lynn Switzer, District Attorney for the
31st Judicial District of Texas
No. 09-9000

Dear Mr. Owen:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
JUL 22 2010
OFFICE OF THE CLERK

No. 09-9000

In The
Supreme Court of the United States

◆

HENRY W. SKINNER,

Petitioner,

vs.

LYNN SWITZER,
District Attorney for the 31st Judicial District of Texas,

Respondent.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

◆

BRIEF FOR PETITIONER

◆

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QUESTION PRESENTED
(CAPITAL CASE)

May a convicted prisoner seeking access to biological evidence for DNA testing assert that claim in a civil rights action under 42 U.S.C. § 1983, or is such a claim cognizable only in a petition for writ of habeas corpus?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to the proceedings in the courts below and in this Court.

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JURISDICTION

The Court of Appeals entered judgment on January 28, 2010. Mr. Skinner's petition for writ of certiorari was filed on February 12, 2010 and granted on May 24, 2010. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

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STATUTORY PROVISIONS INVOLVED

In relevant part, 42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

> laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

The other statutes involved, 28 U.S.C. §§ 2241-2254, which govern federal habeas corpus proceedings, are attached to Petitioner's petition for writ of certiorari as Appendix C.

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STATEMENT OF THE CASE[1]

Mr. Skinner was convicted in 1995 and sentenced to death for murdering his girlfriend Twila Busby and her two adult sons Elwin Caler and Randy Busby in the home they all shared in Pampa, Texas. (JA 17.) Mr. Skinner maintained at trial, and maintains to this day, that he is innocent of these murders. Although he has always acknowledged that he must have been present when the killings occurred, Mr. Skinner has attempted to show, through scientific evidence presented both at trial and in subsequent habeas proceedings, that he was too incapacitated by massive quantities of alcohol and codeine in his system, and by a hand injury incurred prior to the murders, to have possessed the strength and coordination necessary to commit them. (JA 9.) He has also presented extensive evidence, both at trial and in post-conviction proceedings, that Twila Busby's uncle, Robert Donnell, an ex-con with a history of physical and sexual abuse, had both motive and opportunity to have committed the murders. *See* Stay App. at 6-7. This evidence included eyewitness testimony that Ms. Busby had spurned Donnell's crude sexual advances no more than an hour before she was murdered, evidence logs and photos showing that a jacket similar to one that Donnell routinely wore was found next to her body, and the testimony of a neighbor who observed Donnell frantically scouring the inside of his pickup truck with an astringent cleaner, down to the metal floorboards, a day or two after the murders, and destroying the carpet he removed from the vehicle's cab. *Id.* at 6-7, 9.

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[1] Because the district court granted Respondent's motion to dismiss, the facts alleged in the complaint, which appears at JA 5-23, must be presumed true. *See, e.g.*, *Nelson v. Campbell*, 541 U.S. 637, 640 (2004). A more complete description of the facts and procedural background can be found in Mr. Skinner's petition for writ of certiorari at pages 4-16 (Petition for Writ of Certiorari, *Skinner v. Switzer*, No. 09-9000 (Feb. 12, 2010)), and in his application for stay of execution at pages 2-9 and 18-22 (Petitioner's Application for Stay of Execution Pending Consideration of Petition for Writ of Certiorari, *Skinner v. Switzer*, No. 09A743 (Feb. 12, 2010)) ("Stay App.").

Substantial amounts of blood and other biological evidence were present and collected by the police at the crime scene. Yet the only DNA testing of any significance done by the State of Texas prior to trial was of blood stains found on Mr. Skinner's clothing. The State's DNA expert testified at trial that Ms. Busby, Mr. Caler, and Mr. Skinner himself were the likely sources of that blood. (JA 8-9.) She opined that these results suggested Mr. Skinner had contact with two of the victims after they had incurred their injuries, but she acknowledged that they did not speak to how the blood might have gotten there and did not establish that Mr. Skinner was guilty. (JA 9.)

Virtually from the time Mr. Skinner instituted post-conviction proceedings, he has sought testing of the remainder of the DNA material found at the crime scene. In 2000, in response to media pressure, the district attorney who had prosecuted Mr. Skinner decided to test more of the DNA evidence. Even so, he ignored repeated requests by Mr. Skinner's counsel to participate in that testing process so as to insure its integrity and credibility. Instead, the district attorney unilaterally arranged for GeneScreen, a private laboratory, to test some – but still not all – of the DNA material that had not previously been tested. The test results for the items GeneScreen did test, like the DNA test results presented at trial, failed to provide conclusive evidence one way or the other as to who had committed the murders. (JA 10-14.) Mr. Skinner has consistently maintained, however, that the State has avoided testing those items of evidence that are most likely to establish the real killer's identity. Those items include vaginal swabs taken at Ms. Busby's autopsy, which might establish whether she was sexually attacked by Donnell; Ms. Busby's fingernail clippings, which could contain the assailant's DNA if she struggled with him before she was killed; a bloody towel found near Ms. Busby's body, which the killer may have used to wipe blood from his hands; two knives that were likely used to kill the two sons, either of which could contain the killer's DNA; and, finally, the jacket found near Ms. Busby's body, which was spattered with blood and had its owner's sweat stains around the collar. (*See* JA 14-15.)

Shortly after the last of the GeneScreen test results was released in 2001, Texas enacted Article 64 of the Texas Code of Criminal Procedure ("Art. 64"), a statute allowing prisoners to seek post-conviction DNA testing in limited circumstances. *See* Tex. Code Crim. Proc. Ann. art. 64.01 (Vernon 2006 & Supp. 2009). Mr. Skinner has twice filed motions under that statute to obtain DNA testing of the evidence described above. Both motions were denied by the convicting court, and both denials were affirmed by the Texas Court of Criminal Appeals ("CCA"). (JA 15, 17 (citing *Skinner* v. *State,* 122 S.W.3d 808, 811 (Tex. Crim. App. 2003)); JA 19-20 (citing *Skinner* v. *State,* 293 S.W.3d 196, 202 (Tex. Crim. App. 2009)).)[2] In

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[2] In the time between his two state court motions for DNA testing, Mr. Skinner also sought DNA testing through discovery in his simultaneously pending federal habeas action. (JA 17.) Mr. Skinner's habeas petition alleged that his trial counsel had performed deficiently in failing to seek DNA testing of the relevant evidence before trial, and he sought the testing in habeas to prove prejudice from counsels' error. (*Id.*) The Magistrate Judge denied Mr. Skinner's motion, but without prejudice to his "reurging" it if he succeeded in showing deficient performance under *Strickland v. Washington*, 466 U.S. 668, 686 (1984). (JA 17-18.) Because the district court ultimately found that counsel were not deficient in failing to pursue pretrial DNA

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addition to formally seeking DNA testing through Art. 64, Mr. Skinner also has repeatedly requested of Respondent and her predecessors in office that they voluntarily make the evidence available for testing. All of those requests were either ignored or denied. (JA 14, 20.)

While Mr. Skinner's second state court motion for DNA testing was pending before the CCA, this Court rejected an Alaska prisoner's claim for post-conviction DNA testing in *Dist. Att'y's Office v. Osborne*, 129 S. Ct. 2308 (2009), holding that the prisoner had no substantive due process right to such testing. *Id.* at 2322-23. At the same time, however, the Court left the door open for procedural due process claims by state prisoners who have a liberty interest under state law in proving their innocence, invoke a state process under state law to vindicate that liberty interest, and are denied fundamental fairness in their pursuit of that process. *Id.* at 2319-20.

Once the CCA affirmed the denial of his second motion, Mr. Skinner, believing he had a viable due process claim in light of *Osborne*, filed the present lawsuit. The complaint asserts that Respondent's refusal to provide the DNA evidence for testing violates Mr. Skinner's rights under the Fourteenth and Eighth Amendments. (*See* JA 21.) Mr. Skinner's complaint requests only the following relief: (1) a

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testing (JA 18). Mr. Skinner had no opportunity to reurge the motion.

declaratory judgment stating that he is entitled to have access to certain items of evidence for DNA testing at his own expense; (2) a preliminary and permanent injunction requiring Respondent to produce those items of evidence for that purpose, pursuant to an appropriate protocol regarding chain of custody and provisions for their preservation and return; and (3) "[r]easonable attorneys' fees, costs of suit and such other and further relief as [the] Court deems just and proper." (JA 22.) Nothing in the complaint seeks to set aside Mr. Skinner's capital murder convictions or his death sentence, nor does the complaint seek a ruling on any matter that would necessarily demonstrate or imply the invalidity of his convictions or sentence.[3] (*See* JA 22.)

On January 15, 2010, the Magistrate Judge recommended that the suit be dismissed because, under *Kutzner v. Montgomery County*, 303 F.3d 339, 340 (5th Cir. 2002), Mr. Skinner's claim for access to evidence could only be brought in a petition for habeas corpus. Although noting that recent Supreme Court cases had undercut the Fifth Circuit's ruling in *Kutzner*, the Magistrate Judge concluded he was nevertheless bound by *Kutzner's* holding that no claim seeking to "'set the stage'" for a future attack on a conviction – including a claim for access to evidence – could be brought in an action under § 1983. (*See* JA 37-39.); *cf. Kutzner*, 303 F.3d at 341. The district court adopted the Magistrate Judge's report and recommendation. (JA at 45.) The Court of Appeals summarily affirmed, citing *Kutzner*. (JA 48-49.) Mr. Skinner sought a stay of execution pending review in this Court. This Court granted a stay and subsequently granted certiorari. (JA 50.)

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[3] Although the *merits* of Mr. Skinner's constitutional claim were not passed upon below and are not before this Court, it bears emphasizing that Mr. Skinner's claim materially differs from the claim that was before the Court in *Osborne*. Osborne bypassed available state avenues for obtaining DNA testing in favor of a federal action under § 1983 asserting a substantive constitutional right to DNA testing, and the Court relied on that fact in rejecting Osborne's procedural due process claim. *See Osborne*, 129 S. Ct. at 2321. By contrast, Mr. Skinner took advantage of every existing state court procedure for seeking access to DNA evidence, and his federal claim invokes familiar procedural due process principles. (JA 14-20, 21.)

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SUMMARY OF THE ARGUMENT

Mr. Skinner's procedural due process claim falls squarely within the plain language of § 1983, and, absent some other bar to its being cognizable under § 1983, should be allowed to proceed under that statute. The court below purported to find such a bar in *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), where this Court applied a judicially created exception to exclude from § 1983's compass those constitutional claims traditionally understood to lie at the core of habeas corpus. But the "*Heck* exception," as this Court has since repeatedly emphasized, bars only those claims which would, if decided in the prisoner's favor, "necessarily imply the invalidity of his conviction or sentence." *Id.* Moreover, this Court has expressly rejected the view, embraced by the court below, that *Heck* applies where a prisoner merely hopes or expects that a favorable decision in his § 1983 suit might give him a basis for a collateral attack on the conviction or sentence in the future. *See Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005). Accordingly, this Court's cases compel the conclusion that the Court of Appeals erred in finding that *Heck* forecloses Mr. Skinner from bringing his access-to-evidence claim via § 1983.

Redrawing *Heck*'s boundary and abandoning its time-tested rule in favor of some other, necessarily *ad hoc*, approach would needlessly blur the line between § 1983 and habeas corpus, ultimately undermining both. Substituting a vague and difficult-to-apply rule for *Heck*'s bright-line test would also dramatically expand habeas corpus beyond its historic roots and needlessly entangle the Court in the thicket of trying to reconcile habeas procedures with the procedures established by individual states for DNA testing. Such an extensive revision of this area of the law is not only unwise but unnecessary, at least insofar as the exhaustion requirement of federal habeas is concerned, as this Court's ruling in *Osborne* assures that any state prisoner seeking access to DNA evidence must, as a practical matter, invoke all available state avenues of relief before resorting to federal court, just as Mr. Skinner has.

Finally, adhering to the Court's clearly established precedents and allowing cases like Mr. Skinner's to proceed under § 1983 would impose no additional burden on the lower courts and would remain true to the principles of separation of powers, comity, and *stare decisis*.

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ARGUMENT

I. THIS COURT'S PRECEDENTS CLEARLY ESTABLISH THAT MR. SKINNER'S CLAIM FOR ACCESS TO DNA EVIDENCE MAY BE BROUGHT UNDER 42 U.S.C. § 1983.

A. The judicially created *Heck* exception bars only § 1983 claims that necessarily imply the invalidity of the underlying conviction or sentence.

By its terms, 42 U.S.C. § 1983 authorizes "any citizen of the United States or other person within the jurisdiction thereof" who has been subjected "to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws" to initiate a suit in federal court against any person who has caused such deprivation under color of law. 42 U.S.C. § 1983. Mr. Skinner's suit plainly falls within the explicit language of that section: There is no dispute that he is a citizen of the United States, has alleged a denial of due process secured by the Constitution, and has sued a state official who acted under color of law.

The only issue in this case is whether Mr. Skinner's suit, despite falling within the literal scope of § 1983, nevertheless is barred by a judicially created exception that requires certain claims at the "core" of the habeas corpus statute, 28 U.S.C. § 2254, to be brought in a habeas petition. In a series of cases beginning with *Preiser v. Rodriguez*, 411 U.S. 475 (1973), this Court has held that claims brought by state prisoners are cognizable exclusively in habeas when the prisoner challenges "the fact or duration of his confinement" and seeks either immediate or accelerated release. *Id.* at 489. Thus, in *Preiser*, the Court held that a claim for the restoration of good-time credits, which if successful would have resulted in the prisoner's immediate release, was cognizable only in habeas because it attacked "the very duration of . . . physical confinement . . . ." *Id.* at 487-88.

This exception to the scope of § 1983 became known as the "*Heck* exception," after this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994). Heck, convicted of voluntary manslaughter, brought a § 1983 action seeking compensatory damages for an "unconstitutional conviction or imprisonment" as a result of an allegedly unlawful investigation by state prosecutors and investigators. *Id.* at 478-80, 486. Because Heck's entire claim rested on the premise that his conviction was unlawful, this Court concluded that Heck's suit for damages effectively "challenged the legality of [his] conviction," *id.* at 490, and, therefore, could not proceed under § 1983 unless the underlying conviction was first declared invalid. *Id.* at 486-87.

Critically, however, the *Heck* Court stressed that its decision rested on its reading of Heck's complaint as effectively requesting a declaration that his conviction itself was invalid. The Court emphasized that, "if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." *Id.* at 487 (footnotes omitted). As an example of a case that "even if successful, [would] *not* demonstrate the invalidity of any outstanding criminal judgment," *id.*, the Court hypothesized a convicted person who sues for damages under § 1983 after an allegedly unreasonable search produced evidence that was introduced at his trial and resulted in his conviction. *Id.* at 487 n.7. The Court observed that a number of legal doctrines (such as the harmless error rule, the independent source doctrine, or the doctrine of inevitable discovery) might vitiate the constitutional violation with respect to the conviction itself. *Id.* As a consequence, success on such a civil action – challenging only the unreasonable search – would not *necessarily* imply that the plaintiff's conviction was unlawful. Accordingly, the Court concluded, such a claim could properly be brought under § 1983.

The Court has emphasized time and again that under *Heck*, prisoners may bring other types of claims via § 1983 as long as they seek "something other than immediate or more speedy release." *Preiser*, 411 U.S. at 494. Indeed, *Heck* permits a prisoner to proceed via § 1983 even where the relief he seeks might have some incidental impact on his sentence or how it is carried out. *See, e.g.*, *Muhammad v. Close*, 540 U.S. 749, 754 (2004) (holding that claim for damages for injuries allegedly inflicted by a guard during six days of pre-disciplinary-hearing detention was properly brought under § 1983, because, although the claim might "affect the duration of time to be served," it would not "necessarily" have such an effect); *Nelson*, 541 U.S. at 644 (prisoner's challenge to method of execution properly brought under § 1983 because a "suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself").

Subsequently, in *Edwards v. Balisok*, 520 U.S. 641 (1997), an inmate sought a declaration that procedures employed by the State to deprive him of good-time credits violated due process, damages resulting from use of those unconstitutional procedures, and an injunction to prevent the State from employing them in the future. *Id.* at 643. Consistent with its prior decisions, the Court held that Balisok's claim for an injunction to bar future use of the allegedly unconstitutional procedures was cognizable under § 1983 because "[o]rdinarily, a prayer for such prospective relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits . . . ." *Id.* at 648. Applying the *Heck* doctrine to Balisok's other claims as originally construed, the Court unsurprisingly determined that, insofar as the prisoner sought declaratory relief and money damages stemming from alleged deceit and bias on the part of the decision-maker, habeas corpus was the sole vehicle through which he could bring his claim because it "would, if established, necessarily imply the invalidity of the deprivation of [Balisok's] good-time credits." *Id.* at 646. Accordingly, *Balisok* confirms that *Heck* bars *only* those claims that, in fact, challenge the fact or duration of a prisoner's incarceration.

In applying the *Heck* exception, this Court has repeatedly made clear that a claim is not barred simply because the lawsuit is intended by the prisoner as a first step toward an eventual attack on the conviction or sentence. The Court most directly confronted this issue in *Wilkinson v. Dotson*, 544 U.S. 74 (2005), where two prisoners challenged in a § 1983 action Ohio's retroactive application of new parole eligibility guidelines – the effect of which was to delay the dates when the prisoners would become eligible for parole. *Id.* at 78. Canvassing its "legal journey from *Preiser* to *Balisok*" in evaluating the scope of the *Heck* exception,[4] *id.* at 81, this Court summarized

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[4] As the *Dotson* Court explained,

> *Preiser* found an implied exception to § 1983's coverage where the claim seeks – not where it simply 'relates to' – 'core' habeas corpus relief, *i.e.*, where a state prisoner requests present or future release . . . . *Wolff* [*v. McDonnell*, 418 U.S. 539 (1974)] makes clear that § 1983 remains available for procedural challenges where success in the action *would not necessarily* spell immediate or speedier release for the

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that under its precedents, "a state prisoner's § 1983 action is barred . . . *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Id.* at 81-82. Although Ohio had argued that *Heck* should bar the inmates' claim because their *ultimate goal* was to shorten the duration of their confinement, the Court unequivocally rejected this argument:

> The problem with Ohio's argument lies in its jump from a true premise (that in all likelihood the prisoners hope these actions will help bring about earlier release) to a faulty conclusion (that habeas is their sole avenue for relief). A consideration of this Court's case law makes clear that the connection between the constitutionality of the prisoners' parole proceedings and release from confinement is too tenuous here to achieve Ohio's legal door-closing objective.

Id. at 78. Accordingly, the Court in *Dotson* not only reaffirmed the test it had crafted in *Heck*, but also firmly rejected the argument that the *Heck* exception

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> prisoner. *Heck* specifies that a prisoner cannot use § 1983 to obtain damages where success *would necessarily* imply the unlawfulness of a (not previously invalidated) conviction or sentence. And *Balisok*, like *Wolff*, demonstrates that habeas remedies do not displace § 1983 actions where success in the civil rights suit would not necessarily vitiate the legality of (not previously invalidated) state confinement.

Dotson, 544 U.S. at 81.

bars any claim that "simply 'relates to' core habeas corpus relief . . . ." *Id.* at 81. Applying that rule to the claims advanced by the prisoners, the Court concluded that the claims were not foreclosed because success did not *necessarily* mean release from confinement or a shorter prison stay. *Id.* at 82. For one prisoner, it meant "at most new eligibility review, which at most w[ould] speed *consideration* of a new parole application," *id.*; for the other, it meant "at most a new parole hearing at which Ohio parole authorities m[ight], in their discretion, decline to shorten [the inmate's] prison term." *Id.*

The significance of *Dotson*'s teaching – that in applying *Heck*'s "necessarily implies" test, courts should focus on the actual immediate consequences of a successful suit – was echoed in *Hill v. McDonough*, 547 U.S. 573 (2006). Analyzing a prisoner's § 1983 challenge to Florida's proposed method of execution, this Court determined that *Heck* was no bar to such a challenge because, "at this stage of the litigation," *id.* at 583, the prisoner's action "if successful would not necessarily prevent the State from executing him by lethal injection," *id.* at 579, "and thus it could not be said that the suit seeks to establish 'unlawfulness [that] would render a conviction or sentence invalid.'" *Id.* at 580 (quoting *Heck*, 512 U.S. at 486). Accordingly, by refusing to bar even a § 1983 action that could force the State to modify the manner in which it carried out a death sentence, this Court made it as clear as possible that *Heck* forecloses *only* those § 1983 actions that *necessarily* demonstrate or imply the invalidity of the underlying conviction or sentence. *See id.*; *see also Nelson*, 541 U.S. at 647 ("[W]e were careful in *Heck* to stress the importance of the term 'necessarily.'").

B. Mr. Skinner's suit for access to DNA evidence does not challenge the validity of his underlying conviction or sentence.

The relief Mr. Skinner seeks is simple and limited: the opportunity to obtain access to physical evidence for the purpose of conducting DNA testing. That claim "implies nothing at all about [his] conviction." *Harvey v. Horan*, 285 F.3d 298, 308 (4th Cir. 2002) ("*Harvey II*") (Luttig, J., respecting the denial of rehearing en banc). If successful, Mr. Skinner's suit would merely result in Respondent's making the requested evidence available to him. "That act alone – providing [the prisoner] with access to the biological evidence . . . – does not . . . 'necessarily imply' the invalidity of [the prisoner's] conviction or sentence." *Harvey v. Horan*, 278 F.3d 370, 382 (4th Cir. 2002) ("*Harvey I*") (King, J., concurring in part and concurring in the judgment) (citation omitted). Accordingly, nothing in this Court's cases requires that Mr. Skinner's claim be brought in a habeas petition. Indeed, because success on a § 1983 claim for DNA testing "neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody," *Dotson*, 544 U.S. at 86 (Scalia, J., concurring), it is doubtful whether relief on such a stand-alone claim is even available under the habeas statute. *See* Section II.B, *infra*.

While Mr. Skinner may, at some future date, use the results of DNA testing of this evidence to initiate a separate proceeding challenging his incarceration, that fact in no way "necessarily demonstrates" that his conviction is invalid. First and foremost, even if a successful § 1983 action led to DNA tests that proved exculpatory, such results alone would still fall short of mandating Mr. Skinner's immediate or speedier release. Like the prisoners in *Dotson*, Mr. Skinner would be required to overcome several hurdles before his release could even be contemplated, including the initiation of an entirely new legal proceeding.[5] *See Dotson*, 544 U.S. at 82 (discussing various proceedings necessary to secure release upon a favorable ruling on prisoner's § 1983 claim, and the discretionary nature of such proceedings, as proof that prisoners' claims would not necessarily spell speedier release). Indeed, given the uncertain state of the law on claims of actual innocence and the high substantive showing required, *see House v. Bell*, 547 U.S. 518, 555 (2006), most inmates seek other mechanisms for release after favorable DNA tests, such as prosecutorial consent or executive clemency. *See*

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[5] In order to seek release through the state judicial process, Mr. Skinner would be required to file a subsequent habeas corpus application, and, even if the CCA authorized review of the merits of such an application, it would be subject to the high standards governing an actual-innocence claim.

Brandon L. Garrett, *DNA and Due Process*, 78 FORDHAM L. REV. 2919, 2932 n.103 (2010) (noting that, in 88% of cases resulting in exonerations, the prosecutors consented to motions to vacate convictions). Because "we do not know whether providing [the prisoner] with access to evidence would assist or hinder his attempts at exculpation . . . [such a] civil action requesting access to biological evidence does not 'necessarily imply' the invalidity of his conviction."[6] *Harvey I*, 278 F.3d at 383 (King, J., concurring in part and concurring in the judgment).

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[6] Properly enforced, this distinction – between cases that necessarily imply the invalidity of the conviction or sentence and those that do not – should alleviate any concern that allowing access-to-DNA-evidence claims to be brought under § 1983 would open the door for those asserting routine claims under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), to "follow the same course," *Osborne*, 129 S. Ct. at 2325 (Alito, J., concurring). First, a claim like Mr. Skinner's does not assert that his constitutional rights were violated *at trial*, but rather that they were violated after he was convicted. *Brady*'s disclosure obligation, by contrast, applies pre-trial and has never been held to continue after conviction. *See Osborne*, 129 S. Ct. at 2319-20. Second, to prevail under *Brady*, a claimant must prove not only that the prosecution withheld favorable evidence, *Brady*, 373 U.S. at 87, but also that such evidence was material to the verdict, *see Strickler v. Greene*, 527 U.S. 263, 296 (1999) (rejecting *Brady* claim where defendant could show suppression of exculpatory evidence but not materiality). Because materiality to the conviction is an element of a *Brady* claim, success on such a claim *does* necessarily imply the invalidity of the claimant's conviction – which, unlike access-to-DNA-evidence claims, places *Brady* claims firmly at the traditional core of habeas corpus and precludes bringing them via § 1983.

Nor is it relevant that Mr. Skinner hopes that favorable DNA testing results might eventually warrant clemency. *See Dotson*, 544 U.S. at 78 (rejecting the State's contention that the prisoners' "hope [that] these actions will help bring about earlier release" mandated dismissal under *Heck*); *see also Harvey I*, 278 F.3d at 383 (King, J., concurring in part and concurring in the judgment) ("A prisoner's underlying rationale . . . for bringing his § 1983 suit is not relevant under *Heck*. The applicable standard is an objective one . . . ."). There is, of course, no "right" to clemency, which is essentially defined by its discretionary character. *See, e.g.*, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280-81, 284 (1998) (plurality opinion) (contrasting the discretionary nature of clemency proceedings with "the more structured and limited scope of judicial proceedings"). Even if Mr. Skinner prevails on his access-to-evidence claim – or, indeed, thereafter obtains favorable DNA testing results – the executive will not "necessarily" intervene to free him or reduce his sentence. Only if success in his § 1983 action alone – even before the DNA test results were known – compelled the Texas clemency authorities to grant clemency would *Heck* justify making habeas corpus the exclusive avenue for his claim.

Finally, it is always possible – although we believe it unlikely in this case – that test results from the requested physical evidence will be inconclusive or even prove inculpatory, in which case there would be no basis for disturbing the conviction.[7] *See, e.g.*, *Harvey I*, 278 F.3d at 382-83 (King, J., concurring in part and concurring in the judgment); *Harvey II*, 285 F.3d at 308 (Luttig, J., respecting the denial of rehearing en banc).

For all these reasons, every circuit court of appeals – except for the Fifth Circuit – that has directly considered the issue since this Court's path-marking decision in *Dotson* has held that *Heck* does not bar a § 1983 action in which a prisoner seeks only access to DNA evidence for testing. *See Durr v. Cordray*, 602 F.3d 731, 735-36 (6th Cir. 2010); *Grier v. Klem*, 591 F.3d 672, 678 (3d Cir. 2010); *McKithen v. Brown*, 481 F.3d 89, 99 (2d Cir. 2007); *Savory v. Lyons*, 469 F.3d 667, 672 (7th Cir. 2006); *Osborne v. Dist. Att'y's Office*, 423 F.3d 1050, 1054 (9th Cir. 2005).[8] Each of those courts read *Dotson* to eliminate any doubt about how *Heck* should apply to access-to-evidence claims, and recognized the critical difference between the limited nature of the relief sought in such a § 1983 action (i.e., mere access to evidence) and the plaintiff's ultimate – and indefinite – objective of establishing his innocence. *See Durr*, 602 F.3d at 736 ("'[E]very Court of Appeals to consider the question since *Dotson* has decided that because access to DNA evidence [] does not "necessarily spell speedier release," it can be brought under § 1983'" (second alteration in original) (citations omitted)); *Grier*, 591 F.3d at 677 (following *Dotson*, "the circuit split faded away"); *McKithen*, 481 F.3d at 103 n.15 (the question whether to give any weight to the plaintiff's unspoken motives for seeking relief, as opposed to the actual relief sought, "was laid to rest by the Supreme Court in *Dotson*"); *Savory*, 469 F.3d at 671 (*Dotson* explained that the exception from § 1983 coverage exists only where the claim seeks – not where it simply relates to – relief from a conviction or sentence); *Osborne*, 423 F.3d at 1055 ("Any remaining doubt as to the propriety of [our] approach is removed, we believe, by the Court's recent opinion in *Dotson* . . . .").

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[7] In such cases, the test results help confirm for the public that no injustice has occurred. *See generally* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 71-72 (2008) (describing cases in which post-conviction DNA test results proved inculpatory); Josh White, *DNA Tests Confirm Conviction of Rapist; Inmate Claimed Innocence in '89 Case*, Wash. Post, Oct. 10, 2002, at T01; *Harvey I*, 278 F.3d at 383 n.4 (King, J., concurring in part and concurring in the judgment) (citing Brooke A. Masters, *DNA Test Fails to Vindicate Virginia Inmate*, Wash. Post, Nov. 28, 2001, at B8). Of course, the potential scenarios also include the possibility that post-conviction DNA testing will ultimately result in freeing a wrongly convicted prisoner. *See, e.g.*, *Goldschalk v. Montgomery County Dist. Att'y's Office*, 177 F. Supp. 2d 366, 366-67 (E.D. Pa. 2001) (granting relief on prisoner's § 1983 claim for DNA testing after unsuccessful attempts to secure DNA in state court); *Charles v. Greenberg*, No. 00-958, 2000 WL 1838713, at *3 (E.D. La. Dec. 13, 2000) (discussing prisoner's total exoneration after DNA testing which was secured subsequent to § 1983 DNA access litigation); Sara Rimer, *Convict's DNA Sways Labs, Not a Determined Prosecutor*, N.Y. Times, Feb. 6, 2002, at A14 (discussing Goldschalk's exoneration after fifteen years of wrongful incarceration).

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[8] The Eleventh Circuit is also a member of this consensus; it, however, reached this same result even prior to *Dotson*. *See Bradley v. Pryor*, 305 F.3d 1287, 1290 (11th Cir. 2002).

Only the Fifth Circuit continues to insist that *Heck* should be read to bar a § 1983 action for post-conviction DNA testing. It does so – and did so here – by rote reaffirmance of its own pre-*Dotson* decision that focused heavily on the inmate's subjective desire eventually to invalidate his conviction. (*See* JA 48-49 (summarily affirming based on *Kutzner*, which held that no claim seeking to "set the stage for a future attack" on a conviction could be brought via § 1983).)[9] The Fifth Circuit has never acknowledged this Court's more recent precedents, including *Dotson* or addressed the views of its sister circuits, some of which have pointedly criticized its position as inconsistent with this Court's holdings. *See, e.g.*, *Savory*, 469 F.3d at 671-72 (noting that *Kutzner*'s reasoning was inconsistent with *Dotson* and its precursors). Indeed, *Kutzner* is so entrenched in Fifth Circuit law that, even after *Dotson*, federal courts in that circuit have expansively applied *Kutzner* to bar other types of prisoner claims that fall far short of attacking a conviction or sentence. *See Cruz v. Bennett,* No. H-05-1954, 2005 WL 2000703, at *2 (S.D. Tex. Aug. 17, 2005) (relying on *Kutzner* to bar § 1983 action seeking access to appellate slip opinions).

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[9] A divided panel of the Fourth Circuit likewise held – pre-*Dotson* – that an access-to-evidence claim was barred in a § 1983 action, *see Harvey I*, 278 F.3d at 374. Rehearing of the panel's decision was denied on the ground that intervening legislation rendered the case moot, but Judge Luttig, who was not a member of the panel, nevertheless filed a forceful and oft-quoted statement registering his disagreement with the panel decision on the *Heck* issue. *Harvey II*, 285 F.3d at 304, 307 (Luttig, J., respecting the denial of rehearing en banc) (criticizing panel for "fairly clear[ ]" error in holding that *Heck* would bar a § 1983 action for access to evidence for DNA testing). The Fourth Circuit has not revisited the issue since *Dotson*. The Sixth Circuit – which, like the Fourth and Fifth Circuits, had decided pre-*Dotson* that a claim for access to DNA evidence could be brought only in habeas, *Boyle v. Mayer*, 46 F. App'x 340, 340-41 (6th Cir. 2002) (not designated for publication) – has since joined the majority of circuits in allowing this type of claim to be brought under § 1983. *See Durr*, 602 F.3d at 735-36.

The Fifth Circuit's reading of *Heck* cannot survive *Dotson*. The development of this Court's jurisprudence has confirmed Judge Luttig's insight that "the conclusion is inescapable . . . that the claim of a right of access to evidence is not one that in any respect implies the invalidity of the claimant's conviction and sentence." *Harvey II*, 285 F.3d at 309 (Luttig, J., respecting the denial of rehearing en banc). For the reasons discussed more fully below, any other result would depart radically from settled law, create ambiguity and uncertainty where none now exists, and inappropriately thrust the Court into the role of legislative policymaker.

II. A HOLDING THAT ACCESS-TO-DNA-EVIDENCE CLAIMS ARE COGNIZABLE UNDER § 1983 WILL PROVIDE CLEAR, EASY-TO-APPLY GUIDANCE TO THE LOWER COURTS, PRESERVE THE HISTORIC ROLE OF HABEAS CORPUS, IMPOSE NO UNDUE BURDEN ON THE LOWER COURTS, PROMOTE COMITY, AND ADHERE TO THE DOCTRINES OF SEPARATION OF POWERS AND *STARE DECISIS*.

A. Adopting the Fifth Circuit's *Kutzner* rule would blur the line between § 1983 and habeas, and substitute an indefinite, ill-defined test for *Heck*'s clear rubric.

The Court has taken pains over the last thirty years to fashion a bright-line test for determining whether a prisoner's constitutional claim is cognizable under § 1983 or exclusively in habeas. To the extent Respondent urges this Court to depart from its earlier holdings and unnecessarily modify the *Heck* exception, the Court should decline the invitation. The alternative to allowing claims like Mr. Skinner's to be brought under § 1983 is to promulgate a vague and unworkable standard.

Heck's bright-line rule is easy to understand and relatively simple to apply. A federal district court reviewing a prisoner's § 1983 suit ordinarily need not look beyond the claims and prayer for relief to ascertain whether success would necessarily imply the invalidity of the conviction or sentence. In contrast, the test effectively employed by the Fourth Circuit in *Harvey I* and adopted by the Fifth Circuit in *Kutzner* shares a central feature with the one ultimately rejected by this Court in *Dotson*. *See* 544 U.S. at 81. Namely, it requires judgment calls about the prisoner's presumed intent in bringing suit, or how his present claim may somehow "relate to" a possible future collateral attack on his custody. Such a speculative test would frustrate the goal of judicial economy and increase the risk that prisoners' claims will receive disparate treatment. That federal courts within the Fifth Circuit have extended *Kutzner* to bar § 1983 suits to obtain access to appellate slip opinions, *see Cruz*, 2005 WL 2000703, at *2, is ample evidence of the slippery slope that adopting the Fifth Circuit's expanded version of the *Heck* exception would create.

B. A holding that an access-to-evidence claim lies at the "core" of habeas would indefensibly broaden the scope of the Great Writ.

It is important to keep in mind that the *Heck* exception is based on the premise that some limitation on § 1983 is necessary to preserve the specific and historical role of habeas corpus. *See Preiser*, 411 U.S. at 500; *Dotson*, 544 U.S. at 79. Therefore, a conclusion that a claim merely seeking access to evidence nevertheless falls within the *Heck* exception would necessarily imply that the claim lies at the "core" of habeas – and in turn would necessarily imply that the claim could properly be brought *as a free-standing claim* in habeas.

It is far from clear under current law, however, that a claim seeking only access to evidence for DNA testing would – or should – fall within the scope of the habeas statute. Although this Court has extended the writ to include challenges to "less obvious restraints," it has held fast to the notion that habeas corpus is, and must remain, a writ of limited reach. *See Preiser*, 411 U.S. at 486 n.7 (characterizing decisions that might have appeared on their face to expand the scope of habeas as "mark[ing] no more than a logical extension of the traditional meaning and purpose of habeas corpus – to effect release from illegal custody"). Mr. Skinner seeks not release from custody – the traditional relief granted by habeas courts – but only access to evidence. Stretching habeas corpus to include causes of action that do not directly seek release from illegal custody – and, indeed, do not even *imply* that the custody is illegal – risks "utterly sever[ing] the writ from its common law roots." *Dotson*, 544 U.S. at 86 (Scalia, J., concurring).[10]

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[10] Justice Scalia has rightly warned against the danger of such expansion:

> It is one thing to say that permissible habeas relief, as our cases interpret the statute, includes ordering a 'quantum change in the level of custody,' *Graham v. Broglin*, 922 F.2d 379, 381 (C.A. 7 1991) (Posner, J.),

(Continued on following page)

Thus, concluding that Mr. Skinner may not pursue his claim in a § 1983 action would not only unduly restrict the scope of that statute; perversely, and perhaps more ominously, such a holding necessarily would expand the scope of habeas to include claims that might or might not lead to one or more subsequent proceedings in which the prisoner would attempt to show illegal custody itself. Such a holding would depart dramatically from the plain language of the habeas statute, which provides that a federal court may entertain a petition for writ of habeas corpus from a prisoner in custody pursuant to the judgment of a state court "*only on the ground* that he is in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a) (emphasis added), as well as from its historical roots. If such a radical revision of the scope of federal habeas is to be undertaken, it should originate with Congress, not this Court. *See* Section II.E, *infra*.

> such as release from incarceration to parole. It is quite another to say that the habeas statute authorizes federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody.

Dotson, 544 U.S. at 86 (Scalia, J., concurring).

C. Requiring claims such as Mr. Skinner's to be brought in habeas would create great difficulty in reconciling the habeas statute with the individual States' varying procedures for DNA testing.

To be sure, the Court's decision in *Osborne* imposes substantive limits on the scope of claims for access to evidence for DNA testing. This Court, however, did not hold that such claims could never be pursued, but instead left the federal courthouse door open to those prisoners who possess a state-created liberty interest in proving their innocence through new evidence, but are deprived by state officials of fundamentally fair procedures necessary to vindicate that interest. *Osborne*, 129 S. Ct. at 2319-20. The Court's reasoning in *Osborne* turned on the observation that any substantive rights a state prisoner might have to DNA testing are a matter of state, not federal, law, and that state prisoners must avail themselves of those state procedures before they can complain in federal court that the procedures were inadequate. *Id.* at 2321-22.

A holding that a state prisoner's federal-court challenge may proceed only via habeas corpus would require courts to reconcile individual States' procedures for DNA testing with the procedural requirements of the federal habeas statute, which could prove to be a daunting challenge. For example, the federal habeas statute requires that claims first be exhausted in state court, 28 U.S.C. § 2254(b), and a state court's reasonable decision on the merits of any claim forecloses federal relief, *see id.* § 2254(d), (e). After *Osborne*, however, a claim in federal court related to the denial of DNA testing does not fit this mold, because the claim in state court is solely a state-law claim (i.e., whether the prisoner meets the requirements for post-conviction DNA testing under state law), whereas the claim in federal court is that the prisoner was denied his federal constitutional right to fundamental fairness in the process by which the State denied his state-law claim.

To cite another example of the difficulty of trying to fit claims for DNA testing into federal habeas procedures, the habeas statute imposes a one-year limitations period that is tolled for "the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). When Congress wrote this statute in 1995, it could not have anticipated the possibility that an "application for post-conviction or other collateral review" might include a mechanism for DNA testing that is separate and distinct from a State's mechanism for post-conviction relief more generally – as is the case in many States, including Texas. *See, e.g.*, Tex. Code Crim. Proc. Ann. arts. 64.01-64.05 (Vernon 2006 & Supp. 2009) (Texas's post-conviction DNA testing statute). It is uncertain whether an action for DNA testing would qualify as an "application for State post-conviction or other collateral review" for purposes of § 2244(d)(2), and the consequences of such an action on the limitations period are therefore uncertain at best. *See, e.g.*, *Brown v. Sec'y for the Dep't of Corrections*, 530 F.3d 1335, 1337 (11th Cir. 2008) (holding that prisoner's motion for testing under Florida's DNA statute did not amount to "collateral review" and therefore failed to toll the federal habeas statute of limitations).

These examples are illustrative, but certainly not exhaustive, of the struggles that await the federal courts if they are forced to try to shoehorn stand-alone claims for DNA testing into the federal habeas framework. The federal habeas statute simply was not written to accommodate procedural due process claims of the type that survive *Osborne*. This is yet another reason why, if any such radical departure from the *Heck* doctrine is to be undertaken, it should be by Congress, not this Court. *See* Section II.E, *infra*.

D. Allowing claims for DNA testing to be brought under § 1983 will not create an undue burden for federal courts.

There is no reason to fear that the federal court system will be flooded with lawsuits if this Court finds that a claim for access to evidence for DNA testing is cognizable under § 1983. In the first place, as noted above, most circuits already allow such claims to be brought under § 1983. *See Durr*, 602 F.3d at 736; *Grier*, 591 F.3d at 678; *McKithen*, 481 F.3d at 99; *Savory*, 469 F.3d at 672; *Osborne*, 423 F.3d at 1054; *Bradley*, 305 F.3d at 1291. While § 1983 claims for DNA testing are not rare, there is no evidence that such claims have created an undue burden on the district courts in those circuits.[11] In addition, *Osborne* has now greatly circumscribed the contours of an actionable procedural due process claim based on the denial of access to evidence for DNA testing, which will limit the number of claims that may reasonably be expected to be brought in federal court. Finally, the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 ("PLRA"), provides ample means by which federal courts and state officials can be spared any burden imposed by baseless claims. *See, e.g.*, 28 U.S.C. § 1915A (as soon as practicable after filing, the court must assess the potential merit of any complaint suing a governmental entity, officer, or employee, and summarily dismiss any suit that fails to state a claim). Accordingly, there is no reason for concern that a decision for Mr. Skinner will result in a dramatic increase in the burden such cases impose on the federal courts.

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[11] In any event, an avenue for the vindication of constitutional rights should not be denied simply because the contrary result might lead to more claims. *See, e.g.*, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Harlan, J., concurring) (the fear of burgeoning caseloads "should not be permitted to stand in the way of recognition of otherwise sound constitutional principles").

E. Allowing post-conviction DNA testing claims to be brought in § 1983 would be true to the principles of separation of powers, comity, and *stare decisis*.

Beyond the *Heck* exception, this Court has consistently looked to Congress to set any limits on the availability of relief under § 1983. *See, e.g., Tower v. Glover*, 467 U.S. 914, 923 (1984) ("It is for Congress to determine whether § 1983 has become too burdensome to state and federal institutions and, if so, what remedial action is appropriate"). And Congress has imposed such limits when it thought them necessary and appropriate. *See, e.g.*, PLRA § 803(d), *amending* 42 U.S.C. § 1997e (adding several new procedures and penalties for prisoners filing § 1983 lawsuits); PLRA § 804(a)(3), *amending* 28 U.S.C. § 1915(b)(1) (requiring a prisoner proceeding *in forma pauperis* to pay full amount of the filing fee with monthly payments equal to twenty percent of his trust fund account); PLRA § 804(c)(3), *amending* 28 U.S.C. § 1915(f)(2)(A) (requiring a prisoner to pay full amount of any cost assessed against him out of his prison trust fund); PLRA § 804(d), *amending* 28 U.S.C. § 1915(g) (preventing a prisoner who has filed three or more lawsuits that fail to state a claim, or are malicious or frivolous, from filing any civil action unless the prisoner faces imminent danger or physical injury).

The particular type of claim asserted here, moreover, would in no way undermine comity between the federal and state courts. As this Court held in *Dotson* in elaborating on the *Heck* exception, the Court has "already placed the States' important comity considerations in the balance, weighed them against the competing need to vindicate federal rights without exhaustion, and concluded that prisoners may bring their claims without fully exhausting state-court remedies so long as their suits, if established, would not necessarily invalidate state-imposed confinement." *Dotson*, 544 U.S. at 84; *see also, e.g.*, *Preiser*, 411 U.S. at 477 ("For if a remedy under the Civil Rights Act is available, a plaintiff need not first seek redress in a state forum"). When determining whether a claim should fall on the habeas side of the line, a court need only apply the test outlined in *Heck*, and clarified in *Dotson*, which asks simply whether "success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Dotson*, 544 U.S. at 82. If the answer to that question is no, then permitting the suit to proceed under § 1983 poses no threat to comity and federalism.

Moreover, *Dotson*'s explanation that the *Heck* doctrine already takes comity considerations into account holds especially true in the context of the case at bar. Under *Osborne*, a state prisoner who brings a due process challenge to the adequacy of state DNA testing procedures cannot prevail without first having tried to invoke those procedures. 129 S. Ct. at 2321. *Osborne* thus assures that claimants will properly have invoked state procedures before turning to the federal forum, protecting comity in just the same fashion as an explicit requirement that such a prisoner exhaust his available state remedies. Simply put, there is no reason for concern that allowing state prisoners' claims for DNA testing to proceed under § 1983 will result in their "bypass[ing] state courts with their discovery requests," *Id.* at 2324 (Alito, J., concurring), or otherwise undermining the authority of state courts in conflict with the principles of comity.

Finally, given this Court's precedent, adherence to the *Heck* rule is required by principles of *stare decisis*. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law") (citation omitted). This Court's "precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts [the Court] on a course that is sure error." *Citizens United v. FEC*, 130 S. Ct. 876, 911-12 (2010). There is no reason to believe that the exception developed in *Preiser* and later clarified in *Heck* and *Dotson* requires any refinement by this Court. This is especially so where Congress has had ample opportunity to respond to this Court's decisions and has not done so. *See, e.g.*, *United States v. South Buffalo Ry. Co.*, 333 U.S. 771, 784 (1948) (refusing to overrule its own interpretation of a federal statute that "Congress ha[d] not seen fit to set aside"). Indeed, Congress has not only refrained from expressing displeasure with the *Heck* doctrine, but adopted a similar formulation when it specifically excluded from the PLRA's coverage "habeas corpus proceedings *challenging the fact or duration of confinement in prison* . . . ." PLRA § 802(a), *amending* 18 U.S.C. § 3626(g)(2) (emphasis added). Absent clear congressional intent, this Court has been careful not to impose limitations on prisoner claims under § 1983. *See McCarthy v. Madigan*, 503 U.S. 140, 149-52 (1992) (refusing, where "Congress has not meaningfully addressed" the issue, to impose an exhaustion requirement for *Bivens* actions), *superseded by statute on other grounds*, 42 U.S.C. § 1997e; *Patsy v. Bd. of Regents*, 457 U.S. 496, 513 (1982) (explaining that "legislative not judicial solutions are preferable" when setting boundaries on § 1983 actions by prisoners).

Given how entrenched the *Heck* doctrine has now become, abruptly deviating from that doctrine to bar § 1983 actions for DNA testing would amount to unwarranted judicial intrusion into an area best left to the political process. *See, e.g.*, *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 214-15 (1962) ("The question of what change, if any, should be made in the existing law is one of legislative policy properly within the exclusive domain of Congress – it is a question for law makers, not law interpreters"), *overruled in part on other grounds by Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). And it would disrupt settled expectations about the availability of that vitally important mechanism for vindicating constitutional rights. *See,* *e.g.*, *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 272 (1980) (*stare decisis* "serves the broader societal interests in evenhanded, consistent, and predictable application of rules. When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force").

The Fifth Circuit's approach cannot be reconciled with this Court's precedents. *Stare decisis* counsels that in these circumstances the remedy is not for this Court to change course abruptly to accommodate the Fifth Circuit's view – and in the process upset settled expectations – but rather to bring that court into line with what is now well-established law interpreting and applying *Heck*. The Court should hold that Mr. Skinner's claim can proceed and remand the case for consideration of the merits of that claim in the first instance.

◆

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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RESPONDENT'S BRIEF

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HENRY W. SKINNER,
Petitioner,

v.

LYNN SWITZER,
DISTRICT ATTORNEY FOR THE
31ST JUDICIAL DISTRICT OF TEXAS,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

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INTRODUCTION

DNA testing is a powerful technology with great potential to incriminate and convict the guilty as well as to acquit or exonerate the innocent. Society has recognized this power and nearly every state legislature, as well as Congress, has developed procedures and rules to govern its use in a variety of contexts, including in carefully defined circumstances as a means of attacking final state-court criminal convictions.

While the existence of these statutes attests to society's strong interest in rooting out and correcting the injustice of a wrongful conviction, there are also other societal interests legislatures have uniformly sought to weigh in the balance. The States have important interests in preserving the finality of valid convictions; avoiding the costs associated with defending successive, meritless challenges to convictions and sentences; creating reasonable and efficacious procedures for identifying meritorious requests for postconviction review; and wisely using their limited resources for reviewing, processing, and litigating evidentiary requests. Victims have a dignitary interest in justice and vindication without interminable delay caused by guilty prisoners' attempts to stave off punishment. And legislatures have also recognized that DNA evidence is merely one tool in evaluating guilt and innocence, that DNA is not always capable of proving (or disproving) innocence, and that its use postconviction should therefore be limited to circumstances in which there is a meaningful chance of demonstrating actual innocence.

In *District Attorney's Office for Third Judicial District* v. *Obsorne*, 129 S.Ct. 2308 (2009), the Court affirmed that state legislatures are entitled to balance these interests in the first instance and declined to create a stand-alone constitutional right to obtain and test DNA evidence long after a criminal conviction has become final. The Court recognized that no State or the federal government has permitted unlimited postconviction DNA testing. It endorsed giving States wide latitude to devise their own statutory solutions to the problems presented by postconviction access to DNA evidence. And the Court rejected the invitation to sidestep and supplant state-law processes by declining to recognize a stand-alone parallel federal constitutional right to test DNA evidence postconviction for the purpose of attempting to prove innocence.

The Court made clear that state postconviction DNA procedures fit into the normal context of the interplay between state and federal remedies for prisoners seeking to attack their state-court convictions. Congress has decided that the States must have the primary role in adjudicating both postconviction challenges to state-court criminal judgments and postconviction attempts to procure evidence to support such challenges. Thus, the federal habeas statute supplements state remedies, but also imposes a number of restrictions and deference rules to accord the States (and the state courts) initial, primary, and deferred-to authority in this area. The Court, in turn, has implemented this congressional balance by holding that actions seeking to invalidate convictions must be brought in habeas, not under 42 U.S.C. §1983.

DNA-evidence claims are subject to those rules. "There is no basis for [the] approach of assuming that . . . DNA evidence must be treated as categorically outside the process, rather than within it." *Osborne*, 129 S.Ct., at 2323. There is no "DNA is different" exception to existing rules for handling postconviction challenges to a conviction; that is "precisely . . . the contention" the court rejected in *Osborne*. *Ibid*.

Skinner, however, wants to undo *Osborne* and create a free-ranging action that sets up federal district courts as appellate tribunals second-guessing the decisions of state courts under state postconviction DNA evidence statutes. He would do so based on arguments never presented to the state courts or to this Court by petition for certiorari. He has not challenged the constitutionality of Texas's statute by its terms, but merely wishes to challenge how Texas state courts interpreted and applied that statute to his case. Specifically, he wishes to challenge the application of two statutory restrictions that deny him access to evidence, first, because testing the evidence could not cast any doubt on his conviction, and, second, because he made a strategic decision at trial not to test that evidence, a decision he has already unsuccessfully attacked through a federal habeas petition.

Skinner's claim is not cognizable under §1983 because it attacks his conviction and because it attempts to impermissibly turn the federal district court into an appellate tribunal reviewing the constitutionality of state court judgments. Allowing this claim to proceed would interfere with the States' ability to devise and apply their own systems for providing postconviction access to DNA evidence, undermine the federal scheme created and protected by the federal habeas statute, and proliferate collateral, piecemeal, harassing lawsuits that waste state resources.

STATEMENT

Shortly before the stroke of midnight on New Year's Eve in 1993, Henry "Hank" Skinner savagely murdered his girlfriend, Twila Busby, and her two adult, developmentally disabled sons. Skinner was proven guilty of the murders based partly on DNA evidence, but also based on extraordinary amounts of other physical evidence, his own statements, and numerous witnesses' testimony. That is why state and federal courts have rejected his many previous unsuccessful attempts to claim that more DNA testing might somehow exculpate him. As the Court evaluates whether Skinner's asserted §1983 claims are cognizable under *Heck* v. *Humphrey*, 512 U.S. 477 (1994), and similar cases, it is important for the Court to understand the facts various state and federal courts have already reviewed several times in evaluating Skinner's DNA claims, and the tortuous history of how those claims have been repeatedly brought and rejected before they were ultimately renewed in the guise of a §1983 suit in federal district court.

In 1993, Twila Busby lived on East Campbell Street in Pampa, Texas, with her sons, 22-year-old Elwin Caler and 20-year-old Randy Busby. *Skinner* v. *State*, 956 S.W.2d 532, 535 (Tex. Crim. App. 1997). Randy, the more active of the two boys, enjoyed riding his bike around town, running track, and playing basketball for the Special Olympics. T.27.776.[1] Elwin, who went by the name Scooter, had muscular dystrophy and serious diabetes that prevented him from being as active as Randy. T.27.771. The boys were well liked around town and were avid fans of the local high school football team, the Pampa Harvesters. T.27.764, 774.

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[1] The transcript from Skinner's trial is cited as T.[Vol.].[Page]. The transcript from the evidentiary hearing in

Late in the summer of 1993, Skinner became romantically involved with Twila, making him an off-and-on resident at her house. Skinner was jealous of Twila's friendship with a man named Howard Mitchell, believing Twila would "run[] over there [to Mitchell's] and get[] drunk and screw[] up." HS.59A, at 4. Skinner told Mitchell that he would kill Twila if she were ever unfaithful to him. *Skinner*, 956 S.W.2d, at 535 n.3; T.26.531, 594.

Skinner was in Pampa on December 31, 1993. Around 9:30 p.m., Skinner and Twila called Mitchell to ask for a ride to his New Year's Eve party. *Skinner*, 956 S.W.2d, at 535. Mitchell came by sometime between 10:15 and 10:30 p.m. and found Skinner asleep on the couch with a partially consumed bottle of vodka nearby. T.26.576-577. Twila was apprehensive about leaving Skinner to go to Mitchell's, and she explained to Mitchell that she was "worried about '[i]f he [Skinner] wakes up and I'm gone, I'm in trouble,' you know, because he would be mad over it." *Id.*, at 605. But, unable to rouse Skinner, Twila accompanied Mitchell to the party without Skinner. *Id.*, at 577-578; T.29.1275-1276, 1400. At the party, Twila again worried that Skinner

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Skinner's federal habeas proceeding is cited as HT.[Vol.].[Page] and the exhibits from that hearing as HS.[#] or HD.[#] respectively. Respondent has requested permission to lodge these materials, as well as Skinner's briefing in the Court of Criminal Appeals on direct appeal and in his appeals of his article 64 motions.

"might be mad at her" for going to the party without him, T.29.1279, and Mitchell took Twila home between 11:00 and 11:15 p.m. *Skinner*, 956 S.W.2d, at 535.

Shortly after Twila arrived home, she and Skinner apparently got into a fight, as Skinner later intimated in a statement he gave to police. HS.59A, at 11 ("I think that Twila came home drunk and had that knife."). Although he claims to have no clear recollection of what happened, Skinner during the fight was cut on his right palm and later recalled that Twila was "the one that cut my hand. I think that." *Ibid.* Skinner strangled Twila into unconsciousness and then beat her with an ax handle at least 14 times, until her face and skull were severely fractured and deformed. *Skinner*, 956 S.W.2d, at 536; T.28.1171.

Skinner also fatally stabbed Elwin and Randy. While the precise timing was not clear, Skinner also scuffled with Elwin, cutting him with a knife several times on the arms and stomach. See T.24.85-86, 89-90. Skinner then drove the knife deep into Elwin's left side, puncturing his lung. Mortally wounded, Elwin staggered out the front door and went to a neighbor's house for help. Skinner murdered Randy in his bed, stabbing him in the back three times while he lay asleep on the top bunk of his bunk-bed. *Skinner*, 956 S.W.2d, at 536.

Police responding to a 911 call at around midnight discovered Elwin, wearing only his undershorts, slumped and unresponsive on a neighbor's porch. *Id.*, at 535; T.24.82. While waiting for help to arrive, the neighbors wrapped a shawl around Elwin's shoulders to protect against the cold night and pressed a cloth against the deep stab wound in Elwin's side. T.24.56, 65, 82. Although immediately rushed to the hospital, Elwin died at 12:45 a.m. as a result of the knife wound. *Skinner*, 956 S.W.2d, at 535; T.28.1192-1194.

The police soon found a trail of Elwin's blood leading from the front of Twila's house. *Skinner*, 956 S.W.2d, at 536. They also noticed blood smeared on the inside of a glass pane in the front door to the covered porch. A bloody knife lay on the floor inside the porch. Inside the house, police discovered Twila's and Randy's bodies. Police also found a bloody handprint 24 inches above the floor on the frame of the door leading out of the boys' bedroom to a utility room. They found another bloody handprint on the door knob of the door leading from the kitchen to the utility room and another on the knob of the door leading from the utility room to the backyard. All three bloody handprints were Skinner's. *Id.*, at 535-536.

After murdering Twila and the boys, Skinner left by the back door—hence the handprints on the doors leading out back—and made his way on foot three-and-a-half blocks to the home of his former girlfriend, Andrea Reed. He arrived at Reed's trailer home just after midnight, right around the time police arrived to discover Elwin dying on the neighbors' porch. Skinner pounded on Reed's trailer. She told him to leave. He entered anyway, falsely telling her she needed to help him because he had been stabbed and shot. His arms, shirt, and pants were covered in blood. *Id.*, at 535. He wore blood-stained socks but no shoes. He had a bleeding cut on his right palm but was otherwise uninjured. He removed his shirt and hung it across a nearby chair. He told Reed to help him get cleaned up and stitch the cut on his hand. He attempted to heat and bend a number of needles to stitch the cut, but the needles kept breaking. *Skinner* v. *State*, 293 S.W.3d 196, 198 (Tex. Crim. App. 2009). He cleaned the blood off his watch and hands. T.26.495.

Over the course of the next three hours, Skinner told Reed a number of inconsistent stories about what had happened. At one point, when Reed attempted to leave the room to call the police, Skinner stopped her and threatened to kill her and her children. *Skinner*, 956 S.W.2d, at 535-536; *Skinner* v. *Quarterman*, 2007 WL 582808, *9 (ND Tex. Feb. 22, 2007); T.26.496-500. Skinner eventually volunteered to tell Reed what had really happened, provided she would swear not to tell anyone. *Skinner*, 2007 WL 582808, *13; T.26.528. She agreed, and Skinner confessed that he thought he had kicked Twila to death. *Skinner*, 956 S.W.2d, at 536; T.26.501. Police arrived at Reed's home at around 3:00 a.m., where they found Skinner in a bedroom closet, still clad only in blood-stained socks and jeans. *Skinner*, 956 S.W.2d, at 536.

Police collected a large amount of physical evidence from the scene, including the knife left on the front porch, a black plastic trash bag containing a second knife, a towel with brownish stains on it, and a grey jacket near Twila's body. They also collected a number of prints as well as blood and hair samples. At Twila's autopsy, the authorities used a rape kit to collect specimens from Twila, a normal procedure performed in every suspected homicide involving a female victim. The medical examiner found "no evidence of sexual assault." T.28.1205-1206.

Before trial, authorities conducted DNA tests on (1) blood found on Skinner's shirt and pants; (2) blood found on the blanket on Randy's bed;

(3) hairs found on Randy's blanket; and (4) hairs found on Randy's back and cheek. The tests showed that Skinner's shirt contained blood from Twila and Skinner. Skinner's pants contained blood from Skinner, Elwin, and Twila. Those tests placed Skinner at the scene of the crime while it was occurring, a fact he has never disputed. The blood on the blanket was Randy's, the hair found on Randy was his own, and the hair on the blanket was Elwin's. *Skinner*, 956 S.W.2d, at 536; T.28.1135-1137.

At trial, Skinner and his attorney made an informed, strategic decision not to submit the available untested physical evidence to DNA testing. Rather than test the evidence, Skinner argued that the State's failure to test all the physical evidence reflected a shoddy investigation that left a reasonable doubt as to his responsibility for the murders. Skinner's counsel confirmed when he later testified in federal habeas proceedings that testing the remaining evidence would have been inconsistent with a major theme of Skinner's defense. See *Skinner*, 2007 WL 582808, *31; *Skinner* v. *Quarterman*, 528 F.3d 336, 341-342 (CA5 2008).

Skinner was convicted of capital murder, and the Texas Court of Criminal Appeals (CCA) affirmed Skinner's conviction on direct appeal. *Skinner*, 956 S.W.2d, at 546. Skinner's subsequent petition for certiorari was denied. 523 U.S. 1079 (1998). On direct appeal, Skinner did not request additional DNA testing or claim error by failure to do more testing. He challenged the sufficiency of the evidence, but only by arguing that there was insufficient evidence to prove he killed *three* people, as opposed to just two. See *Skinner*, 956 S.W.2d, at

536-537 ("Appellant concedes that the evidence is sufficient to prove that appellant killed both Twila and Elwin.").[2]

On March 26, 1998, Skinner filed a petition in Texas state court seeking a writ of habeas corpus, which the court dismissed as untimely. The CCA affirmed on December 2, 1998. Skinner filed a federal habeas petition on February 5, 1999. Those proceedings, however, were administratively closed and stayed in 2000 so Skinner could file a second state habeas petition due to a change in state law permitting consideration of previously untimely habeas applications. The CCA, however, later denied Skinner's second state habeas petition because of the pending federal habeas petition. See *Ex parte Skinner*, No. 20,203-04 (Tex. Crim. App. Oct. 10, 2001).

In 2000, Skinner began requesting access to evidence for the purpose of DNA testing. J.A. 14. In July 2000, then district attorney John Mann, responding to media reports about the case, voluntarily sent some of the untested physical evidence to a private lab in Dallas, called GeneScreen, for DNA testing. The lab testing was mixed, with both inculpatory and inconclusive results. *Skinner*, 2007 WL 582808, *30.

On October 9, 2001, Skinner filed his first postconviction motion for DNA testing under article 64 of the Texas Code of Criminal Procedure. *Skinner* v. *State*, 122 S.W.3d 808, 809-811 & n.2 (Tex. Crim. App. 2003). Skinner requested DNA testing of: (1) vaginal swabs from the rape kit; (2) fingernail clippings from Twila; (3) the knife from the front porch; (4) the knife found in the plastic bag; (5) the dish towel found in the plastic bag; and (6) blood and hairs from the jacket near Twila's body. The district court held that Skinner failed to meet article 64's requirements in part because he failed to show that there was a reasonable probability the DNA tests would prove his innocence. *Id.*, at 811.

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[2] Skinner's brief on direct appeal contains several similar concessions. Skinner Direct Appeal Br. 20, 22-23.

The CCA affirmed, agreeing that Skinner failed to demonstrate "a reasonable probability existed that he would not have been prosecuted or convicted if the DNA test results were exculpatory." *Id.*, at 813. Skinner did not argue to either the district court or the CCA that article 64 is unconstitutional or that the statute had been unconstitutionally applied. See *ibid.* Skinner did not petition for certiorari following that ruling.

Skinner revived his federal habeas proceedings with a second petition, asserting nine grounds for relief, including ineffective assistance of counsel premised on the failure to subject all available evidence to DNA testing. In connection with the habeas petition, Skinner also filed a motion requesting DNA testing, arguing it was needed to show prejudice from counsel's ineffective assistance. The magistrate judge denied the motion requesting postconviction DNA testing.

After an extensive three-day evidentiary hearing on November 16-18, 2005, the magistrate judge ultimately recommended denial of Skinner's petition, and the district court adopted the magistrate's report and recommendation. *Skinner*, 2007 WL 582808, *1. The Fifth Circuit affirmed. *Skinner* v. *Quarterman*, 576 F.3d 214 (CA5 2009), *cert. denied*, 130 S.Ct. 1689 (Mar. 1, 2010).

While that appeal was pending, Skinner filed a second motion in Texas state court seeking postconviction DNA testing under article 64. The district court denied the second article 64 motion on numerous grounds, including because Skinner's strategic decision not to test the available evidence at trial meant he could not show that the failure to test was "through no fault of" his own. Tex. Code Crim. Proc. art. 64.01; *Texas* v. *Skinner*, No. 5216 (41st Dist. Ct., Gray County, Tex. Dec. 4, 2007); *Skinner*, 293 S.W.3d, at 209. The court also found that Skinner's second motion failed to show he would not have been convicted had the evidence been tested and presented at trial. *Skinner*, No. 5216, at *3-*4.

Once again, the CCA affirmed. The appellate court agreed that Skinner could not satisfy the no-fault provision in article 64 because he had chosen not to test the evidence before trial. The Court noted that both state and federal courts had found that the decision not to test was a "reasonable trial strategy," *Skinner*, 293 S.W.3d, at 197, and concluded that without a showing of ineffective assistance the fault provision should bar article 64 relief to a prisoner who chose to forgo testing at trial. *Id.*, at 202-203. The court also rejected Skinner's argument that additional postconviction evidence presented in the federal habeas proceeding could undermine the conclusion that Skinner had received effective assistance of counsel in, and therefore was at "fault" for, deciding pretrial not to test the evidence. *Id.*, at 203-204. The court reviewed in detail the evidence presented at the trial, and in the federal habeas proceeding, and concluded that none of it could "call into question defense counsel's strategy to forego DNA testing." *Id.*, at 204-206.

Skinner filed the underlying lawsuit, asserting under §1983 that the current district attorney, Lynn Switzer, was violating his constitutional rights "[b]y refusing to release the biological evidence for testing, and thereby preventing [Skinner] from gaining access to exculpatory evidence that could demonstrate he is not guilty of capital murder." J.A. 20-21. Skinner's complaint includes no claim or allegation that article 64 is unconstitutional or that the Texas courts unconstitutionally applied it to Skinner. In his briefing in the district court, Skinner confirmed that he "does not contend that the violations of his due process rights were caused by the adverse judgments of the Texas state courts," and asserted that he did not request that the district court "review or reject any state court judgments." Resp. Mot. Dismiss at 6.

The district court dismissed Skinner's complaint for failing to state a claim upon which relief can be granted. *Skinner* v. *Switzer*, 2010 WL 273143, *7-*8 (ND Tex. Jan. 20, 2010). The court based its ruling on *Kutzner* v. *Montgomery County*, 303 F.3d 339 (CA5 2002), which held that "a prisoner's request for DNA testing of evidence relevant to his prior conviction is 'so intertwined' with the merits of the conviction as to require habeas corpus treatment." *Id.*, at 341. The district court also noted that if Skinner had alleged in his complaint that the Texas courts had unconstitutionally applied article 64, then the argument that the *Rooker-Feldman* doctrine deprived the court of jurisdiction would have "considerable merit." *Skinner*, 2010 WL 273143, *5.

The Fifth Circuit affirmed. *Skinner* v. *Switzer*, 2010 WL 338018, *1 (CA5 Jan. 28, 2010) (*per curiam*). This Court granted a stay of execution and subsequently granted a writ of certiorari.

SUMMARY OF ARGUMENT

The Court has held that the federal habeas statute, and the limitations placed on that remedy by Congress, must be preserved by preventing prisoners from challenging their convictions or sentences under 42 U.S.C. §1983. This rule protects interests of federal-state comity that are effectuated in the procedural, deference, and exhaustion standards Congress has written into the habeas statute. Beginning with *Preiser* v. *Rodriguez*, continuing through *Heck* v. *Humphrey*, and culminating most recently with a series of prison-discipline and parole cases, the Court has developed a doctrinal line that allows challenges to conditions of confinement to be brought under §1983, but requires attacks on convictions or sentences to be brought in habeas.

Contrary to Skinner's assertions, it is not how a claim is artfully pleaded that determines whether it implies the invalidity of the conviction. Rather, it is the substance of the claim and not only the relief specifically requested that determines whether the *Heck* bar applies. If any necessary component or allegation of the complaint implies that the conviction or sentence is invalid, the claim must be brought in habeas. The Court has never in any of these cases held that §1983 may be used to pursue an attack on a conviction, to gather evidence to support an attack on a conviction, or to challenge the procedures afforded by a State to gather evidence to support an attack on a conviction.

Although Skinner consistently refuses to define the constitutional right he seeks to invoke, or describe with any detail how that right was allegedly violated, his petition intimates, and his merits brief ultimately argues, that the Texas courts unconstitutionally applied the state testing statute. That is not the claim Skinner pleaded in his complaint or pursued in the district court. In the district court, he argued that Switzer directly deprived him of his constitutional right to access DNA evidence.

In this Court, however, Skinner apparently concedes that *Osborne* ruled out any such claim, and so he now reformulates his argument to assert a violation of his constitutional right to fundamental fairness in the procedures by which the State denied his state-law claim. At bottom, however, Skinner's claim still attempts to use the federal courts to obtain discovery that he says is exculpatory—and therefore lies at the core of habeas because it has a material bearing on his conviction and is inseparable from his assertion that he is innocent.

The Texas postconviction-testing procedures and judicial application of those procedures are inseparable from the underlying issue of Skinner's guilt and conviction. Because there is no such thing as a freestanding procedural due process claim, any postconviction-testing right Skinner may have is necessarily bound up with his state-law right to use postconviction procedures to establish his innocence. The statutory procedure emanates from and exists solely in the context of a challenge to a conviction based on a claim of innocence.

The elements of the statute are inextricably intertwined with questions about the conduct of the trial and the weight of the evidence. Texas's testing statute requires a showing that the requested testing will show, to a reasonable probability, the convicted person's innocence. The statute also prevents defendants from strategically declining to test DNA at the time of trial and then urging for the first time, postconviction, a right to test evidence. The Texas courts held that Skinner failed to meet *both* of these requirements. Each basis independently supported rejection of Skinner's requests for testing and each is inseparable from Skinner's trial and conviction.

Construed generously, the claims Skinner describes in his brief ask the federal courts to overrule the state-law requirement that testing is not available to those who made a strategic pretrial choice not to test and to reweigh de novo the overwhelming evidence supporting his conviction to conclude that testing could show a reasonable probability of his innocence. Skinner's claims effectively ask the federal court to evaluate the strength of the evidence on which he was convicted and to reexamine whether he should be bound to the strategic choices made by trial counsel. These claims, if permitted, would clearly imply the invalidity of his conviction. They are not only a proper subject for habeas, they in fact have already been made the subject of previous habeas claims by Skinner.

Allowing Skinner to proceed under §1983 would thwart Congress's careful balancing of delicate federal-state interactions and install the federal district courts as overseers of state-DNA-access procedures and proceedings. Congress has created a number of restrictions designed to limit federal interference in state and criminal matters, including deference and exhaustion requirements, which would be frustrated if a separate suit under §1983 were permitted every time a convicted person sought discovery for the purpose of testing evidence postconviction. Subjecting state procedures to federal district court review, interpretation, and application would threaten to turn them into federal procedures, essentially installing the federal courts as overseers of all, ostensibly state-law, DNA-testing requests.

Skinner's claims are also barred by substantial jurisdictional and procedural impediments to the Court's consideration of Skinner's case. The *Rooker-Feldman* doctrine divested the federal district court of jurisdiction because Skinner is a two-time state-court loser and cannot ask a federal district court to overturn a final state-court judgment. Skinner's apparent challenges to the Texas courts' application of article 64 should have been raised in the Texas courts in the first instance, but were not, and could have been the subject of a petition for certiorari, but were not.

Further, the claims Skinner asserts now were not raised in the lower courts, and are, therefore, not properly before the Court. Skinner's complaint asserted no challenge to the substance of article 64 or the Texas courts' disposition of his claims under the statute. And, in any event, his current arguments do not state any conceivable claims against Lynn Switzer. To complain of an arbitrary or unconstitutional application of state law by the state courts, Skinner would have to have sued the Texas state courts who made those rulings, but he did not, because that would have only highlighted his insurmountable *Rooker-Feldman* problems. The combination of shifting contentions and the wrong defendant make this case a good candidate for dismissal as improvidently granted.

ARGUMENT

I. THE *HECK* RULE PROTECTS INTERESTS OF COMITY AND FEDERALISM BY REQUIRING ATTACKS ON CONVICTIONS TO BE BROUGHT IN HABEAS.

Both Congress and the Court have made great efforts to ensure that States and state courts will be the primary actors in handling postconviction challenges by state prisoners. Habeas proceedings are extraordinarily intrusive because they allow collateral review of state criminal judgments, and to limit that intrusiveness Congress has implemented through the habeas statute a number of restrictions designed to cabin federal interference, including an exhaustion requirement, a restriction on successive petitions raising the same claim, and deference rules that require federal district courts to defer to state court findings of both fact and law. 28 U.S.C. §§2244(b), 2255; see *Williams (Terry)* v. *Taylor*, 529 U.S. 362, 386, 404 (2000); *Williams (Michael Wayne)* v. *Taylor*, 529 U.S. 420, 436 (2000).

The Court, for its part, has "long recognized the principles of federalism and comity at stake when state prisoners attempt to use the federal courts to attack their final convictions." *Osborne*, 129 S.Ct., at 2324; see also *Williams (Michael Wayne)*, 529 U.S., at 436 (noting that the Court has been careful to "limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings"). The Court has developed the *Heck* rule in part to effectuate Congress's design by preventing claimants from escaping congressionally mandated safeguards merely by artfully pleading claims under §1983 instead of in habeas. See *Heck* v. *Humphrey*, 512 U.S. 477 (1994).

The *Heck* rule limits the claims cognizable under §1983 to protect the function of and limitations on the federal writ of habeas corpus. See *Osborne*, 129 S.Ct., at 2318 ("[Section] 1983 must be read in harmony with the habeas statute."); *Heck*, 512 U.S., at 497 (Souter, J., concurring) (agreeing with the majority that the rule was designed to preserve "the habeas statute's policy . . . that state courts be given the first opportunity to review constitutional claims bearing upon a state prisoner's release from custody").[3]

The rule originated in *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), which confirmed that habeas, not §1983, is the only proper federal venue for "an attack by a person in custody upon the legality of that custody." *Id.*, at 500. The Court reasoned that, while §1983 applied on its face to the claims at issue, the habeas statute, which also clearly applied, should, as the more specific enactment, control. *Id.*, at 489-491. In *Preiser*, and after, the Court has made clear that the purpose of the rule is to preserve "the core of habeas" and respect "considerations of federal-state comity." *Id.*, at 487, 490-491; accord *Nelson* v. *Campbell*, 541 U.S. 637, 643 (2004) ("[Section] 1983 must yield to the more specific federal habeas statute, with its attendant procedural and exhaustion requirements, where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence.").

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[3] The need for this line-drawing was occasioned by prior judicial decisions that expanded the scope of both habeas and §1983. *Heck*, 512 U.S., at 491 (THOMAS, J., concurring).

Since *Preiser*, the Court has several times considered how to apply the rule to new situations. In *Heck*, the Court confirmed that this prohibition protecting the core of habeas extends to damages suits that "necessarily imply the invalidity of a conviction." 512 U.S., at 487. *Heck* is the only time the Court has considered a putative §1983 claim by a prisoner relating to the conduct of a trial and the evidence presented (as well as allegedly wrongly withheld) at the trial. *Ibid.* The Court held that, even though the plaintiff was not seeking directly to undo his conviction, the findings he sought would have "necessarily impl[ied]" the invalidity of his conviction and, consequently, the claim was not cognizable under §1983 at all. *Id.*, at 483.

All of the subsequent cases originated, like *Preiser*, in the context of attacks on procedures governing the serving or carrying out of a prison sentence—for good-time credits, parole, or internal prison disciplinary determinations. *Edwards* v. *Balisok*, 520 U.S. 641, 646-648 (1997); *Muhammad* v. *Close*, 540 U.S. 749, 750 (2004); *Nelson*, 541 U.S., at 642; *Wilkinson* v. *Dotson*, 544 U.S. 74, 78 (2005). Indeed, among the most common positive formulations of the *Preiser-Heck* rule is that §1983 allows prisoners to bring "challenge[s] to the conditions of a prisoner's confinement." See *Nelson*, 541 U.S., at 646-647 (citing *Muhammad*, 540 U.S., at 750).

Edwards established that a plaintiff's challenge to a deprivation of good-time credits is not cognizable under §1983 when it is based on procedural attacks that imply the invalidity of that ruling—specifically, allegations that the decisionmaker was biased and deceitful.[4] 520 U.S., at 646-648. *Dotson* established that prisoners challenging state parole procedures based on claimed *ex post facto* and due process violations could do so in a §1983 suit because they sought merely a declaration that the procedures were unconstitutional and not to challenge the determinations in their particular cases. 544 U.S., at 82. The Court reasoned that there was no *Heck* bar because "the connection between the constitutionality of the prisoners' parole proceedings and release from confinement is too tenuous here." *Id.*, at 78.

The application of the *Heck* bar hinges not on whether a plaintiff can artfully plead around a direct attack on his conviction, but instead on the actual nature of the underlying claim asserted. See *Osborne*, 129 S.Ct., at 2325 (ALITO, J., concurring). Indeed, preventing evasion of the restrictions and limitations on habeas through artful pleading is one of the main purposes of the rule. See, *e.g.*, *Preiser*, 411 U.S., at 489-490. The test is thus not about "the actual immediate consequences of a successful suit." Skinner Br. 16. If that were true, *Heck* itself would have come out differently, but the Court definitively rejected the assertion that "the relief sought in a §1983 action dictates whether a state prisoner can proceed immediately to federal court." *Heck*, 512 U.S., at 497 (Souter, J., concurring); *id.*, at 481-482.

Instead, the inquiry looks to "the connection between [the claim asserted] and release from confinement." *Dotson*, 544 U.S., at 78. If any necessary component or allegation of the claim implies that the underlying conviction is invalid, then it is not cognizable. *Heck*, 512 U.S., at 481-482. In particular, when the claim directly challenges the underlying decision as arbitrary and flawed, it is not cognizable under §1983. *Edwards*, 520 U.S., at 646-648; *Heck*, 512 U.S., at 482-483 (disapproving §1983 claims founded on an alleged deprivation of rights caused by "reaching the wrong result").

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[4] In *Edwards*, the prisoner alleged that the hearing officer denied the prisoner the ability to present witness statements and lied in denying that no such statements were available. 520 U.S., at 644-645.

The Court has never held that any prisoner may use a §1983 suit to gain access to evidence in the hopes of using it to support an attack on a conviction or to collaterally attack state courts' judgments under state postconviction relief statutes or state court discovery rulings made during the course of postconviction proceedings. *Osborne*, 129 S.Ct., at 2326 (ALITO, J., concurring) ("We have never previously held that a state prisoner may seek discovery by means of a §1983 action, and we should not take that step here.").

II. *HECK* BARS SKINNER'S CLAIMS.

A. Skinner's Claim Is That the Texas State Courts Arbitrarily Applied Texas's Postconviction DNA Testing Statute.

To analyze whether Skinner's claim is cognizable under §1983, it is crucial to understand the nature of that claim, the constitutional violation he asserts, and how it relates to his conviction. This is difficult because Skinner's complaint, petition, and brief are all vague in the extreme about the nature of his claim, and what little detail he has provided has changed from stage to stage of the litigation.

Skinner's petition and brief are full of language describing the claim generically as an "access to evidence" claim or "DNA testing" claim. *E.g.*, Pet. 2-3, 14-16, 25, 28, 30; Skinner Br. 17, 20, 23, 25-26. But that does not reveal what his claim actually is, or on what conduct by a state actor it is based. Skinner's complaint describes the claim in this way:

> "By refusing to release the biological evidence for testing, and thereby preventing Plaintiff from gaining access to exculpatory evidence that could demonstrate he is not guilty of capital murder, Defendant has deprived Plaintiff of his liberty interests in utilizing state procedures to obtain reversal of his conviction and/or to obtain a pardon or reduction of his sentence, all in violation of his right to Due Process of Law under the Fourteenth Amendment to the Constitution of the United States." J.A. 20-21.

Thus, in his complaint, Skinner asserted that his claim is that District Attorney Switzer's refusal to turn over "exculpatory" evidence violates his federal constitutional rights. Moreover, he took pains to insist that his claim was against Switzer and was not in any way a challenge to the rulings of the Texas courts on his article 64 motions. Skinner insisted in the district court that he was "in no way request[ing] that [the court] review or reject any state court judgments," but was only claiming that Switzer violated his constitutional rights by refusing to provide access to the requested evidence. Resp. Mot. Dismiss 6; see also *id.*, at 3 (asserting that he did not "complain of injuries caused by any state court judgment"). The district court concluded that Skinner had not raised the CCA's application of the statute "as a claim for relief" and noted that any such claims, if raised, would likely be barred by the *Rooker-Feldman* doctrine. J.A. 33-34.

In his petition and merits briefing to this Court, however, Skinner has attempted to reframe his claim (when he describes it at all) as a claim that he was denied due process by the Texas courts' application of article 64. Pet. 6-7, 29; Skinner Br. 7 n.3, 29, 30. He has abandoned any claim of a freestanding violation caused by Switzer and expressly denies that his claim is like the *Brady*-related claim rejected by *Osborne*. Instead, he now roots his claim in his failed attempt to obtain relief under article 64. Skinner Br. 7 n.3, 19 n.6. Specifically, he now asserts that he was harmed by the decisions of the CCA, which he claims were "arbitrary and capricious" and "irrational," and he asserts that his §1983 claim would have accrued when the CCA made its decision. Skinner Br. 6; Pet. 6-7. His petition references "as-applied challenge[s] [that] may be accurately evaluated by the district court on remand." Pet. 29.

Thus, Skinner currently describes his claim as asserting that the Texas courts' application of article 64 was so arbitrary as to deny him meaningful access to state post-conviction relief—even though he expressly disavowed that claim in the district court. See *Lewis* v. *Casey*, 518 U.S. 343, 351 (1996). The CCA denied Skinner's first article 64 motion because it determined that, in light of the existing evidence against him, he could not show that there was a reasonable probability that further DNA testing would prove his innocence. *Skinner,* 122 S.W.3d, at 811. Skinner suggests that the CCA's evidence weighing was "arbitrary and capricious" and so denied him due process. Pet. 6. He argues that the court relied too heavily on selective test results that were obtained by the former district attorney without the involvement of Skinner's postconviction counsel. *Ibid.*

The CCA denied the second article 64 motion because, since Skinner had chosen not to test the DNA evidence at trial, and since he was unable to establish that he had received ineffective assistance of counsel in making that decision, he could not make the required showing that the failure to test the evidence was "through no fault of" his own. *Skinner*, 293 S.W.3d, at 209. In arriving at that conclusion, the court reviewed extensively the evidence at trial, the evidence from Skinner's habeas proceeding, and the potential evidence from the requested testing, to conclude the fault provision applied because the "decision to forgo testing was a reasonable trial strategy." *Id.*, at 203-209.

Skinner argues that the CCA's interpretation of article 64's "no fault" provision was "irrational," because it would require a defendant who chose strategically to "put the State to its burden of proof . . . to forever waive the opportunity to prove his innocence by DNA evidence." Pet. 7. He also states that he could not have knowingly waived his right to postconviction DNA testing during his trial because article 64 was not yet in place. *Id.*, at 6-7.

Finally, it is important to note that Skinner has never claimed in any court that article 64 is unconstitutional by its terms. Instead, he effectively conceded below that the statute is constitutional on its face. See Resp. Mot. Dismiss 13 ("As in *Osborne*, the State's procedures appear adequate on their face . . . ." (internal quotation marks omitted)).

B. Skinner's Claim Attacks His Conviction and Is Not Cognizable Under §1983.

Skinner's claim is barred by *Heck* because it is inextricably connected to attacking his conviction. It is based on an asserted constitutional right that springs out of his claimed liberty interest in showing his innocence. The relief he seeks is "the discovery of evidence that has a material bearing on his conviction," an attempt that "falls within 'the core'" of habeas and is therefore not cognizable under §1983. *Osborne*, 129 S.Ct., at 2325 (ALITO, J., concurring). And, as presented in this Court, his claim is that state procedures as applied by the Texas state courts denied him a fair opportunity to establish his innocence, based on challenges to state court determinations about the evidence underlying his conviction and his strategic decisions at trial. J.A. 22; Skinner Br. 2, 6-7; Pet. 7, 14-15. Those attacks are necessarily bound up with attacking his conviction and therefore are barred by *Heck*.

1. If Skinner's Claim Were a Freestanding Claim Against Switzer, It Would Be Barred by Both *Osborne* and *Heck*.

It appears that Skinner has abandoned a claim that Switzer somehow directly violated his constitutional rights, as he alleged in his complaint. But, if he were continuing in this Court to assert a claim based solely on Switzer's conduct, it would be barred by both *Osborne* and *Heck*.

Before *Osborne*, prisoners seeking access to DNA evidence would often bring §1983 suits against district attorneys premised on "the principles that motivated" *Brady* v. *Maryland*, 373 U.S. 83 (1963). See *Dist. Attorney's Office for Third Judicial Dist.* v. *Osborne*, 521 F.3d 1118, 1131 (CA9 2008). The claim was that the district attorney deprived the plaintiff of a constitutional right by refusing to turn over evidence that might show he was innocent. See, *e.g.*, *Derrickson* v. *Dist. Attorney of Delaware County*, 316 Fed. Appx. 132, 133 (CA3 2009); *Bradley* v. *King*, 556 F.3d 1225, 1229-1230 (CA11 2009); *Osborne*, 521 F.3d, at 1132. Similarly, if individuals had a freestanding, substantive-due-process right to access DNA evidence, see, *e.g.*, *McKithen* v. *Brown*, 481 F.3d 89, 107 n.17 (CA2 2007), then a district attorney who could provide access to DNA evidence would directly deprive the defendant of that right by refusing to do so.

In *Osborne*, however, the Court explained that "*Brady* is the wrong framework" for obtaining DNA evidence once an individual has already been convicted. *Osborne*, 129 S.Ct., at 2320. *Osborne* also held that an individual does not have a freestanding postconviction federal right to access DNA evidence. *Osborne*, 129 S.Ct., at 2322.[5] Given this framework, which was established by *Osborne* before Skinner filed his §1983 suit, Skinner cannot state a claim by asserting that Switzer's refusal to provide him access to DNA evidence is the cause of his harm. That is why, although he pleaded this sort of claim in his complaint, he has backed away from it in this Court in favor of challenging the Texas court's resolution of his article 64 proceedings.

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[5] With that ruling, the Court in *Osborne* rejected the premise of those circuit court decisions that had held that §1983 could be used to assert a freestanding federal constitutional claim for access to DNA testing. See, *e.g.*, *Harvey* v. *Horan*, 285 F.3d 298, 208-310 (CA4 2002) (Luttig, J.) (respecting denial of rehearing en banc).

Even if he had not abandoned the claim, and had *Osborne* not squelched any such freestanding claim, the claim would be barred by *Heck*. Discovery—access to evidence—cannot be had in a vacuum; it must be requested in connection with some substantive claim or right. See *Houston Bus. Journal, Inc.* v. *Office of the Comptroller of the Currency*, 86 F.3d 1208, 1213 (CADC 1996) ("The federal courts are not freestanding investigative bodies whose coercive power may be brought to bear at will in demanding documents from others."); *Osborne*, 129 S.Ct., at 2319 ("Process is not an end in itself."); *Olim* v. *Wakinekona*, 461 U.S. 238, 250 (1983) (same).

Instead, a §1983 claim for violation of procedural due process only can be made in the context of a state-created liberty interest. In this case, Skinner claims a liberty interest "in utilizing state procedures to obtain reversal of his conviction and/or to obtain a pardon or reduction of his sentence." J.A. 21; see also *Kentucky Dept. of Corrs.* v. *Thompson*, 490 U.S. 454, 463 (1989).[6] Skinner's asserted procedural due process right is completely bound up in and dependent upon this claimed state-law liberty interest in showing his innocence. His assertion of innocence is a necessary component of his claim, as is evident when he describes the alleged violation as

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[6] Respondent does not concede that any such liberty interest exists, but if one does it requires only minimal procedural safeguards. See *Ohio Adult Parole Authority* v. *Woodard*, 523 U.S. 272, 280-282 (Rehnquist, C.J.), 289 (O'Connor, J., concurring) (1998).

District Attorney Switzer's "preventing Plaintiff from gaining access to exculpatory evidence that could demonstrate he is not guilty of capital murder."[7] J.A. 20-21; see also *Obsorne*, 129 S.Ct., at 2325 (ALITO, J., concurring) (noting nearly identical allegation in Osborne complaint). Since Skinner is seeking "the discovery of evidence that has a material bearing on his conviction," a core habeas function, his claim is not cognizable under §1983. *Ibid.*

Further, the immediate relief Skinner seeks—access to evidence for the purposes of DNA testing—is relief that can be sought (and that, in fact, Skinner has already sought and been denied) in federal habeas.

Securing and presenting evidence in habeas has long been a part of procedure under the writ, and thus subsists comfortably in the core of habeas. From early on, American habeas courts "routinely allowed prisoners to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner." *Boumediene* v. *Bush*, 128 S.Ct. 2229, 2267 (2008). In the states, the practice was governed by statute, and many if not most allowed the securing and taking of evidence in the habeas proceeding: "[T]he court or judge on the return to the writ will hear evidence anew if justice require it, and for that purpose may summon the prosecuting witness, investigate the criminal charge, and discharge, let to bail, or recommit the prisoner, as may be just and legal." William Smithers Church, A Treatise on the

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[7] Despite what he asserts now, Skinner Br. 2, Skinner has not always maintained his innocence. On direct appeal, he conceded that there was sufficient evidence to show that he had murdered two of the victims. *Skinner*, 956 S.W.2d, at 536-537.

Writ of Habeas Corpus 270 (Bancroft-Whitney 2d ed. 1893); see also Rollin C. Hurd, A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus 277-285 (W.C. Little & Co. 2d ed. 1876) (collecting state statutes). And, since the enactment of the federal Habeas Corpus Act of 1867, the federal courts have been open to the consideration of evidence not in the trial record. See Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 ("The . . . judge shall proceed in a summary way to determine the facts of the case, by hearing testimony."); see also *Townsend* v. *Sain*, 372 U.S. 293, 311 (1963) ("this Court has consistently upheld the power of the federal courts on habeas corpus to take evidence relevant to claims of such detention.").[8]

At present, discovery in habeas is routine, albeit discretionary, and governed by a well-developed set of rules and limitations, which Skinner through this lawsuit seeks to circumvent. See Rules Governing Section 2254 Cases, Rule 6(a); *Bracy* v. *Gramley*, 520 U.S. 899, 904 (1997); *Harris* v. *Nelson*, 394 U.S. 286, 300 (1969). In short, securing access to evidence has long been, and is today, part of the core of habeas corpus. There is, therefore, no merit to Skinner's claimed concern that barring his suit under §1983 will threaten to impermissibly expand the scope of habeas. Skinner Br. 26-27; see *Dotson*, 544 U.S., at

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[8] A habeas petitioner must have a cognizable claim before discovery can be taken in support of it. Here, Skinner has already lost on his ineffective assistance of counsel claim, and it is dubious whether there is a cognizable federal claim for actual innocence. See *House* v. *Bell*, 547 U.S. 518, 554-555 (2006). But this does not change the fact that seeking access to evidence in the course of attacking a conviction is and has been a core habeas function.

78 (SCALIA, J., concurring). *Dotson* involved requested relief—new parole hearings—that was beyond the power of a federal district court to order in a habeas suit. *Dotson*, 544 U.S., at 78.

2. Skinner's Challenges to the Texas Courts' Application of Article 64 Depend on Attacking His Conviction.

Skinner's challenge to the Texas courts' application of article 64 is barred by *Heck* for all of the above-noted reasons a freestanding claim would be—it depends on his assertion of innocence and it seeks to uncover exculpatory evidence. Moreover, it is tied up with an attack on the validity of Skinner's conviction in specific ways that make triggering the *Heck* bar inescapable.

The article 64 procedure Skinner is attacking is itself inseparable from questions about Skinner's guilt or innocence and the conduct of the underlying trial. See *Hutson* v. *Quarterman*, 508 F.3d 236, 236 (CA5 2007) (*per curiam*) (holding that an article 64 filing tolls habeas deadlines because it is a "collateral review" of the conviction); *Price* v. *Pierce*, 2010 WL 3189427, *5-*6 (CA7 Aug. 13, 2010) (agreeing that article 64 proceedings seek collateral review of the conviction). The article 64 right exists only by virtue of an assertion in "the convicting court" that the conviction is invalid. Tex. Code Crim. Proc. arts. 64.02, 64.03, 64.04. It applies only to evidence "that was secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense." *Id.*, art. 64.01. If the motion is granted and testing is allowed, "the convicting court shall hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted." *Id.*, art. 64.04. Moreover, if that hearing is favorable to the convicted person, the court that hears the motion may release him on bail pending the conclusion of additional court or pardon proceedings. See *Hutson*, 508 F.3d, at 238-239.

Further, for Skinner to prove his claim of an unconstitutional application of article 64, Skinner would have to show the Texas courts erred in concluding that the testing he seeks has no potential to show that he should not have been convicted. He would also have to demonstrate that the Texas courts erred to the point of arbitrariness in concluding that Texas's statute does not permit testing for those who strategically decide not to seek it at trial, or that it is unconstitutional for a State to forbid testing to someone who strategically chose not to conduct it at trial. Both these attacks are inextricably intertwined with questions about the validity of his conviction and the conduct of the trial.

Skinner's claim is thus not like the one in *Dotson*, in which the prisoner argued that the state procedures were unconstitutional and sought a new hearing as relief. *Dotson*, 544 U.S., at 82. Skinner has never alleged that Texas's statute is unconstitutional by its terms; nor could a federal court order a Texas state court to hold a new article 64 hearing. Skinner's claim is instead like the one in *Edwards*, in which the prisoner argued that the state court's decision applying the state procedures was arbitrary, and sought to reverse and override that decision. *Edwards*, 520 U.S., at 648.[9] Further, because the challenge to the Texas court ruling under Texas's specific article 64 procedure is inextricable from an attack on the evidence supporting the conviction and the conduct of the trial, the analysis differs from that in the pre-*Osborne* cases that considered whether a freestanding federal constitutional right to DNA testing could be asserted in a §1983 suit. See, *e.g.*, *Harvey* v. *Horan*, 285 F.3d 298, 308-310 (CA4 2002) (Luttig, J., respecting denial of rehearing en banc).

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[9] Skinner is also wrong that *Dotson* somehow imposes a categorical rule that allows any sort of lawsuit that stops short of asking a federal district court to expressly declare the

a. Reweighing the Evidence Supporting the Conviction

Article 64 requires weighing the trial evidence to determine whether and how strongly it supports the conviction. The statute allows testing when a movant "establishes by a preponderance of the evidence that . . . the person would not have been convicted if exculpatory results had been obtained through DNA testing." Tex. Code Crim. Proc. art. 64.03. In this case, the Texas courts reviewed the evidence supporting the conviction, as the statute requires, and decided that the requested testing could not cast doubt on Skinner's conviction because it could not affect or undermine the overwhelming

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underlying conviction invalid. Skinner Br. 15-16. The Court in *Dotson* did not attempt to settle, and could not have settled, the question of how the *Heck* analysis applies to claims challenging the application of state postconviction procedures for accessing evidence in order to attack a conviction. Cf. *Osborne*, 129 S.Ct., at 2326 (ALITO, J., concurring) ("We have never previously held that a state prisoner may seek discovery by means of a 1983 action."). Moreover, *Dotson* itself did not prescribe a categorical rule, but a pragmatic analysis that considers how "tenuous" is the connection between the §1983 suit and release from confinement. *Dotson*, 544 U.S., at 78.

evidence of Skinner's guilt. *Skinner*, 122 S.W.3d, at 811. This conclusion about the weight of the evidence is what Skinner attacks in his petition as "arbitrary and capricious." Pet. 6.

Skinner thus now wants a federal district court to reweigh the evidence's tendency to support his conviction and override the Texas court's conclusion that there is no room for doubt. If he succeeds, the validity of his conviction will be conditionally called into doubt. Indeed, Skinner himself concedes that "[b]ecause materiality to the conviction is an element of a ***Brady*** claim, success on such a claim *does* necessarily imply the invalidity of the claimant's conviction—which . . . places *Brady* claims firmly at the traditional core of habeas corpus and precludes bringing them via §1983." Skinner Br. 16 n.9. But Skinner's claims similarly depend on asking the federal district court to (re)analyze whether the evidence sought is material to the conviction and overturn the Texas state courts' conclusion that the requested evidence could not materially affect the conviction. That question is inextricably, not "tenuous[ly]," connected to the validity of his conviction. *Dotson*, 544 U.S., at 78.

To make out the claim he wants to assert, Skinner would have ask the federal court to reweigh the evidence of his guilt against the possible results of the testing he seeks to determine whether a "reasonable probability exists that exculpatory DNA tests would prove [his] innocence." *Rivera* v. *State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002) (internal quotation marks omitted); see *Obsorne*, 129 S.Ct., at 2316 ("Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent."). He would, moreover, have to demonstrate that the Texas courts were not just wrong, but so arbitrary in erring as to deny him due process. The overwhelming evidence of Skinner's guilt shows just how involved a federal district court would have to become in reweighing the evidence that supports his conviction, and how far a court would have to go to undermine the state courts' conclusion that the validity of the conviction could not be affected by further DNA testing because testing could at most "merely muddy the waters." *Rivera*, 89 S.W.3d, at 59 (internal quotation marks omitted).

On direct appeal, Skinner conceded that the evidence was sufficient to show he killed Twila and Elwin. *Skinner*, 956 S.W.2d, at 536-537. Skinner admits he was in the house during the murders. Skinner Br. 2. Skinner previously told Howard Mitchell he would kill Twila if she were ever unfaithful to him. *Skinner*, 956 S.W.2d, at 535 n.3; T.26.531, 594. Twila, on the night of her murder, was apprehensive about leaving Skinner at home, both before she left her house and while at Mitchell's house.

Skinner's first action after the murders was not to call police or seek help for Twila, Randy, and Elwin, but to flee to Andrea Reed's house, where he barged into her home covered in blood. Once there, he did not ask to be taken to the hospital but, instead, asked Reed to stitch his hand. Skinner then confessed to Reed that he thought he had killed Twila and threatened to kill Reed and her children if she called the police. *Skinner*, 2007 WL 582808, at *2-*3. He refused to allow Reed to contact Twila or anyone else. *Skinner*, 956 S.W.2d, at 535-536; T.26.499. When the police arrived later, Skinner hid in a closet, and when told he was being arrested on outstanding warrants, replied, "Is that all?" T.25.361-362; T.27.789-790.

Skinner gave a statement to police on January 4, which was admitted at trial, in which he conceded he "might" have killed Twila. HS.59A, at 12 ("I can might [sic] even see maybe I might have killed her."). He also acknowledged that he thought Twila was the person who had cut his hand, not some third person, and intimated that he and Twila had been in a fight that night. *Id.*, at 12 ("But I think she's the one that cut my hand. I think that.").

Tests on the blood on Skinner's clothes showed it belonged to Twila, Elwin, and Skinner. Skinner's bloody handprints were found on the frame of the door in the boys' bedroom and on the doorknobs of the doors leading from the kitchen to the utility room and out to the backyard. *Skinner*, 956 S.W.2d, at 535-536.

In response to this overwhelming evidence of guilt, Skinner argued he was too intoxicated to have committed the murders, submitting trial testimony from a toxicology expert. But "the facts of this case and the undisputed evidence of the acts [Skinner] did perform and was capable of performing [] directly contradict [the expert's] opinion." *Skinner*, 2007 WL 582808, at *25. Skinner indisputably was able to walk almost four blocks to Reed's house, and once there, enter her home uninvited, take off his shirt and drape it over a nearby chair, ask her to sew up his hand, heat and attempt to bend needles to use in stitching his cut hand, find and use the bathroom, clean the blood from his watch, and threaten to kill Reed and her children if she tried to call the police. See also HS.59A, at 18 (boasting to police that he was able to accomplish a great deal "mentally" while drunk). That is why the jury that heard and weighed the evidence rejected Skinner's claims of incapacitation.

Skinner also pointed to a man named Robert Donnell as the possible killer, claiming that a jacket, "similar to one that Donnell routinely wore" was found near Twila's body. Skinner Br. 3. But the jacket found near Twila was not the same color as the one Donnell commonly wore. *Skinner*, 2007 WL 582808, at *27. And testimony at the federal habeas evidentiary hearing revealed that Twila had a consensual sexual relationship with Donnell and that tests on a rape kit can detect semen from consensual sex performed several days before the rape-kit samples were obtained. *Ibid.*; T.28.1046. Thus, any of Donnell's DNA that may have turned up on the jacket, which lay in a high traffic area in the house, or the rape kit samples would have, at most, "merely mudd[ied] the waters." *Rivera*, 89 S.W.3d, at 59.

In short, there is no escaping the fact that Skinner's claim would require a federal court to reweigh the evidence supporting the conviction, and that Skinner would be asking the federal courts to conclude not merely that the CCA was wrong, but that it was so wrong as to violate the Constitution when it concluded that the postconviction DNA testing Skinner sought could not cast sufficient doubt on his conviction to justify permitting the testing to go forward.

b. Attacking the Conclusion That Relief Was Barred by Skinner's Strategic Trial Decision Not to Test.

In addition to attacking the Texas courts' weighing of the evidence supporting the conviction, Skinner would also have to attack their conclusion that testing is barred by the "no fault" provision of the statute because he deliberately chose not to test the DNA evidence at trial, and cannot show that choice was the product of ineffective assistance of counsel. *Skinner*, 293 S.W.3d, at 209.

When as in this case the evidence could have been tested at trial but was not, article 64 requires the movant to make a threshold showing that the failure to test was "through no fault of the convicted person." Tex. Code Crim. Proc. art. 64.01(b). The Texas courts have (quite reasonably) determined that this statutory language requires denying the motion when, as in this case, the movant made a reasonable strategic pretrial decision not to test. *Skinner*, 293 S.W.3d, at 209. The Court affirmed the constitutionality of a substantially similar requirement under Alaska law. *Osborne*, 129 S.Ct., at 2320-2321 (noting under Alaska's procedures, in which the Court saw "nothing inadequate," evidence must be "newly available" to qualify for testing); see also *id.*, at 2329 (ALITO, J., concurring) ("When a criminal defendant, for tactical purposes, passes up the opportunity for DNA testing at trial, that defendant, in my judgment, has no constitutional right to demand to perform DNA testing after conviction.").

Skinner claims, however, that the CCA's interpretation of article 64's "no fault" provision was "irrational," because the CCA's interpretation would require a defendant who chose strategically to "put the State to its burden of proof . . . to forever waive the opportunity to prove his innocence by DNA evidence." Pet. 6-7. In short, he asks the federal courts to enshrine in the Constitution a defense right to sandbag the prosecution, take back reasonable strategic decisions made at trial, and override State efforts to hold defendants to the consequences of their choices at trial.

He also states that he could not have knowingly waived his right to postconviction DNA testing during his trial because article 64 was not yet in place. Pet. 6-7. But that argument ignores *Osborne*'s holding constitutional Alaska's requirement that any evidence to be tested was not previously available at trial. It also ignores that the Texas statute focuses on "fault," not "waiver"—the Texas statute, as construed by Texas courts, does not ask whether the prisoner "waived" at trial his postconviction right, but whether the failure to test at trial was attributable to the prisoner—i.e., his "fault." *Skinner*, 293 S.W.3d, at 197. In any event, neither argument was made to the Texas courts, nor even mentioned in his §1983 complaint.

The CCA's conclusion that Skinner was barred by the "no fault" provision is inextricably linked with a weighing of the evidence supporting his conviction. In deciding that Skinner was barred by the fault provision, the court reviewed the trial evidence, the federal habeas evidence, and the potential evidence from the requested testing, to conclude that he could not show any ineffective assistance in the strategic decision not to test at trial. *Skinner*, 293 S.W.3d, at 203-209.

Thus, to succeed on his attack in federal court, Skinner would again have to ask the federal district court to revisit the CCA's weighing of the evidence. He would also have to overturn the conclusion of the CCA, as well as the federal habeas court, that his counsel made a reasonable strategic decision not to test. *Skinner*, 293 S.W.3d, at 209; *Skinner*, 2007 WL 582808, *31. In effect, Skinner is attempting to use §1983 as an alternative, and successive, means of reasserting his ineffective assistance claims, which were previously rejected. Regardless, his efforts to assert that kind of claim would necessarily imply the invalidity of his conviction. See, *e.g.*, *Johnson* v. *McElveen*, 101 F.3d 423, 423 (CA5 1996).[10]

3. Skinner Has Never Raised a Facial Challenge to Article 64 and Any Such Challenge Would Be Futile.

Finally, Skinner has never at any point argued that article 64 is unconstitutional by its terms. Instead, he effectively conceded below that the statute is constitutional on its face. See Resp. Mot. Dismiss 13 ("As in *Osborne*, the State's procedures appear adequate on their face . . . ." (internal quotation marks omitted)). In any event, any such claim would be futile because article 64 does not even remotely "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Osborne*, 129 S.Ct., at 2320 (quoting *Medina* v. *California*, 505 U.S. 437, 446 (1992)); *Parratt* v. *Taylor*, 451 U.S. 527, 542 (1981) ("[T]he existence of an adequate state remedy . . . avoids the conclusion that there has been any constitutional deprivation." (citation omitted)). Indeed, Texas's statute is more generous than the Alaska procedures upheld in *Osborne* and easily passes constitutional inquiry.

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[10] Importantly, Skinner would have to succeed on both arguments to succeed on his claims—either the reasonable-probability ground or the no-fault ground is fully independently to support the Texas courts' denial of testing.

Article 64 does not restrict the availability of testing; any convicted person may file a motion for DNA testing. See Tex. Code Crim. Proc. art. 64.01. There is no time limit on seeking testing. *Ibid*. The statute requires only "a reasonable probability [ ] that exculpatory DNA tests would prove innocence," *Rivera*, 89 S.W.3d, at 59, in contrast to Alaska's "clear and convincing evidence" standard, *Osborne*, 129 S.Ct., at 2317. Texas inmates seeking testing are "entitled to counsel." See *Winters* v. *Presiding Judge of Criminal Dist. Court*, 118 S.W.3d 773, 775 (Tex. Crim. App. 2003) (emphasis and citation omitted). Appeal is available and the statute has been liberally construed to allow successive motions for DNA testing. *E.g.*, *Ex parte Lively*, 2007 WL 1783852 (Tex. Crim. App. June 20, 2007).

Further, article 64 contains all the key elements for "a good DNA access law" recommended by the Innocence Project. The Innocence Project, Fact Sheets, http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php (last visited Sep. 7, 2010). The Texas statute also comports in all relevant respects with the Federal Innocence Project Act of 2004, which serves as a model for state DNA testing statutes. See *Osborne*, 129 S.Ct., at 2316-2317; Innocence Protection Act of 2004, §411, 118 Stat. 2279, codified in part at 18 U.S.C. §3600.

C. Allowing Skinner's Claim to Proceed Would Thwart the Interests That Motivate the *Heck* Rule.

Allowing Skinner to pursue his claim through §1983 rather than where he should, in habeas, would disrupt the state-federal balance Congress has implemented and this Court has striven to maintain, by allowing postconviction evidentiary attacks on state court convictions without any of the restrictions the Court and Congress have imposed on such attempts.

Specifically, Skinner will be able to evade the statutory requirement of deference to state-court fact findings and legal rulings by mounting a *de novo* collateral attack on the state courts' determinations that the requested testing could have no reasonable potential to demonstrate his innocence and that he made a reasonable strategic decision not to test at trial. 28 U.S.C. §2254(d), (e). He will evade the exhaustion requirement by raising a due process claim—that he was denied due process by the application of the state article 64 procedure—that he never presented in any state court. 28 U.S.C. §2254(b); see Skinner Br. 30; see also *Rose* v. *Lundy*, 455 U.S. 509, 518 (1982) ("'It would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." (citation omitted)). He will also potentially escape the restriction on successive petitions by collaterally relitigating the ineffective-assistance claim that has already been rejected in federal habeas. 28 U.S.C. §2244. And, he will evade the one-year statute of limitations imposed by the statute.[11] 28 U.S.C. §2244(d).

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[11] Relatedly, there is no merit to Skinner's argument that affirmance would put prisoners in a difficult position in light of AEDPA's one-year statute of limitations. Skinner Br. 30-31. Instead, that statute of limitations is tolled by 28 U.S.C. §2244 while a prisoner uses article 64, as the Fifth Circuit has confirmed. See *Hutson*, 508 F.3d, at 236. This is just as Congress intended; the prisoner should pursue all state avenues

The Court should not give Skinner and those like him a free ranging right to probe state courts' evidentiary rulings in postconviction proceedings. Doing so would unleash an unprecedented "federal intrusion into state criminal adjudications" and seriously undermine "the States' interest in the integrity of their criminal and collateral proceedings." *Williams (Michael Wayne)*, 529 U.S., at 436.

It would also completely undermine *Osborne*'s statement that the state legislatures should be allowed to take the lead in developing systems and procedures to deal with the power of DNA testing. The States are entitled to determine the mechanism by which they will each "ensure the fair and effective use of [DNA] testing within the existing criminal justice framework." *Osborne*, 129 S.Ct., at 2316. Texas enacted article 64 to provide wrongly convicted persons access to testing that could establish their innocence. But Texas also imposed legitimate restrictions on that access, requiring a movant to show that he is not at fault for the failure to test previously available evidence and that testing could tend to show his innocence. *Skinner*, 293 S.W.3d, at 201; see House Research Organization Focus Report 76-26, DNA Evidence and Texas' Criminal Justice System, at 5-9 (Nov. 10, 2000) (discussing the vigorous debate surrounding the scope and nature of restrictions to postconviction DNA testing); House Research Organization, Bill Analysis, Tex S.B. 3, 77th Leg., R.S. (2001) at 2, 6 ("[The standard] would ensure that a favorable test would show that an

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for challenging his conviction (including attempts to access evidence to challenge that conviction), and only then proceed to federal court to assert in habeas any federal constitutional defects in the process afforded him by the State.

inmate was innocent, not merely muddy the waters in a case.").

Skinner grievously misreads *Osborne* when he suggests that the Court in that case somehow contemplated and approved a separate §1983 suit attacking state-court determinations under the applicable state post-conviction-testing statutes. Skinner Br. 29 (asserting that *Obsorne* "left the courthouse door open" to §1983 suits like Skinner's). Indeed, it would eviscerate *Osborne* if the Court's support for the primacy of state procedures in DNA testing were reinterpreted as an authorization to sidestep every state-court ruling on those same procedures through a subsequent §1983 suit. *See Osborne*, 129 S.Ct., at 2312. Nor does holding Skinner's claims noncognizable under §1983 leave him and those like him without recourse. Instead, his constitutional arguments could have been raised in the state court system and then reviewed by this Court on petition for writ of certiorari. See 28 U.S.C. §1257. Skinner took two appeals, but raised in neither any constitutional challenge, and never petitioned this Court for certiorari.

Skinner's §1983 claims are, at their core, merely an invitation to second-guess the Texas courts' interpretation and application of a constitutional Texas statute, to effectively "sidestep state process through a new federal lawsuit." *Osborne*, 129 S.Ct., at 2321. The Court should reject this attempt to "take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts." *Id.*, at 2312; see also *Smith* v. *Robbins*, 528 U.S. 259, 274-275 (2000) (recognizing that States must have broad discretion in devising criminal justice rules).

Allowing Skinner's claim would also have a number of harmful practical consequences of the type the *Heck* rule is meant to prevent. It would undermine finality by permitting collateral relitigation, promote inefficiency through relitigation and piecemeal litigation, and increase costs by encouraging a proliferation of new suits challenging state court postconviction evidentiary and discovery determinations.

Skinner's proposed rule will undermine finality by reopening many settled rulings from both state and federal courts. In this case, Skinner seeks to relitigate:

- The state courts' direct-appeal determination that Skinner conceded the sufficiency of the evidence to show he had committed two of the murders;
- The state courts' weighing of the evidence under article 64 to conclude that the requested testing could not undermine the proof of his guilt;
- The state courts' determinations under article 64 that Skinner's reasonable strategic decision bars him from seeking article 64 relief; and,
- The federal habeas court's determination that he did not receive ineffective assistance of counsel when he made the strategic decision not to test the evidence he now wants tested.

In no other context can a litigant simply ignore what courts have previously ruled in other proceedings as Skinner seeks to do by claiming the right to seek discovery of DNA evidence in order to challenge his conviction not only under state law and in federal habeas but also separately under §1983.[12] And the Court has already rejected this approach. "[T]here is no basis for [the] approach of assuming that . . . DNA evidence must be treated as categorically outside the process, rather than within it. That is precisely what his §1983 suit seeks to do, and that is the contention we reject." *Osborne*, 129 S.Ct., at 2323.

Skinner's rule will also encourage piecemeal litigation of claims that should be adjudicated holistically in one habeas proceeding. *Sanders* v. *United States*, 373 U.S. 1, 18 (1963) ("Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal ligation.") Prisoners could use a series of §1983 actions to assemble the pieces of an attack on their convictions before ever attempting to formally challenge their convictions in federal habeas proceedings.

Moreover, *guilty* prisoners will be able to multiply nuisance and delay through a rash of piecemeal §1983 suits. If Skinner's claim is allowed to proceed under §1983, there is no reason that he could not bring further §1983 lawsuits seeking to test other pieces of evidence. And future litigants, after pursuing state statutory remedies, could bring a separate §1983 suit for each individual piece of evidence they wish to test.

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[12] Habeas allows collateral attack on state-court criminal judgments, but only subject to important restrictions requiring deference and exhaustion, and prohibiting successive claims.

These ills, moreover, will be multiplied through a wave of costly suits. "[R]equests for postconviction DNA testing are not cost free." *Osborne*, 129 S.Ct., at 2329 (ALITO, J., concurring). If Skinner's claims are accepted, there will be a proliferation of §1983 suits seeking access to DNA evidence based on alleged arbitrariness in state procedures, obliterating the efforts by the States (and the respect for those efforts Congress has written into the habeas statute) to balance these competing interests and conserve limited resources by allowing limited access to DNA evidence postconviction.

Finally, there will be no principled reason to limit these new claims to DNA evidence. Certainly, Skinner advances no limiting principle to restrict this new §1983 cause of action to article 64 proceedings (or similar proceedings under analogous state DNA statutes). Instead, any time a state court denies a prisoner access to discovery in a state postconviction proceeding, he will have placed in his back pocket a future §1983 lawsuit after losing all other avenues to invalidate his conviction. Artful pleading will allow escaping the *Heck* bar by claiming the plaintiff merely seeks discovery through an attack on the state courts' denial of that discovery and not to challenge the conviction. Cf. *Osborne*, 129 S.Ct., at 2325 (ALITO, J., concurring) ("The rules set forth in our cases and codified in AEDPA would mean very little if state prisoners could simply evade them through artful pleading.").

Any prisoner who seeks for example to perform additional postconviction voice analysis on a recording (*e.g.*, in a drug conspiracy case), but is denied that discovery by the state postconviction court and the federal habeas court, could then bring a §1983 suit claiming that the state courts violated the Fourteenth Amendment by "preventing Plaintiff from gaining access to exculpatory evidence" and "depriv[ing] Plaintiff of his liberty interest in utilizing state procedures to obtain reversal of his conviction and/or to obtain a pardon or reduction of his sentence." J.A. 20-21. The gate would be open to freeroving postconviction discovery efforts under the guise of §1983 lawsuits. *Osborne*, 129 S.Ct., at 2325 (ALITO, J., concurring). The Court should avoid going down this path.

III. SKINNER'S CHALLENGES ARE JURISDICTIONALLY BARRED BY THE *ROOKER-FELDMAN* DOCTRINE.

In addition to being not cognizable, the §1983 claim Skinner now presents to this Court is one the district court had no jurisdiction to hear. The lower federal courts cannot second-guess final state court judgments, because 28 U.S.C. §1257 "vests authority to review a state court's judgment solely in [the Supreme] Court." *Exxon Mobil Corp.* v. *Saudi Basic Industries Corp.*, 544 U.S. 280, 292 (2005). The *Rooker-Feldman* doctrine effects this restriction by barring suits brought in federal district court "by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.*, at 284.

Skinner's claims that the Texas state courts violated his constitutional rights in denying his article 64 motions are barred by *Rooker-Feldman*. Clearly a "state-court loser[]," *Exxon Mobil Corp.*, 544 U.S., at 284, Skinner characterizes his harm, at least in this Court, as a violation of procedural due process resulting from a fundamentally unfair application of article 64 by the state courts. Skinner Br. 6; see also *id.*, at 29. He characterizes his claims as "as-applied challenges," Pet. 29, attacking evidence-weighing in the first article 64 proceeding as "arbitrary and capricious," Pet. 6, and arguing that the CCA's denial of his second article 64 motion was "irrational." Pet. 6-7. Skinner also asserts that his §1983 claims accrued when the CCA ruled. See Skinner Br. 6. By his own description, his alleged harm was caused by the state courts' judgments. *See In re Smith*, 349 Fed. Appx. 12, 15 (CA6 2009); *Skinner*, 2010 WL 273143, *4-*5.

Skinner's as-applied claims also readily satisfy the remaining two *Rooker-Feldman* requirements. By arguing that the state courts got their analysis of state law wrong in denying his article 64 motions, Skinner's claims directly invite federal-court review and reversal of the now final state court decisions. And he filed his §1983 suit only after the state courts had finally rejected his article 64 claims. See Skinner Br. 6. To complain in federal court of an unconstitutional application of article 64 by the Texas courts, Skinner should have sought a writ of certiorari from the CCA's denials of his article 64 motions or filed an application for writ of habeas corpus. He did neither, and there is no jurisdiction for a federal district court to hear his claims now.[13]

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[13] Nor should the Court give any credence to Skinner's claims in his petition that this case presents no *Rooker-Feldman* issues. Skinner told the district court his claims have no *Rooker-Feldman* problem because he was not challenging the state court's ruling, later encouraged the Court to take the case because it was a clean vehicle in which the district court had

IV. PROCEDURAL SNARES OF SKINNER'S OWN MAKING WOULD JUSTIFY DISMISSING THE CASE AS IMPROVIDENTLY GRANTED.

Skinner's refusal to clearly define his claims, and, "deliberate[] changing [of] positions according to the exigencies of the moment," create a disconnect between his complaint and his current arguments. *New Hampshire* v. *Maine*, 532 U.S. 742, 750-752 (2001) (citations omitted) (noting the threat to judicial integrity when a party's positions are "clearly inconsistent" and "would create 'the perception that [a] court was misled'"). These shortcomings of Skinner's own making call into question whether the Court should decide the case at all. Cf. *Canton* v. *Harris*, 489 U.S. 378, 384-385 (1989) (explaining that an inexact and contradictory presentation of the issues below may undermine the Court's examination of an issue).

Skinner originally argued that Switzer herself deprived him of his constitutional right to access DNA evidence, and he disclaimed any challenge to the state-court decisions. See Skinner Resp. Mot. Dismiss 6. He has now abruptly changed

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already determined *Rooker-Feldman* was not at issue, and then in his merits brief presented his claim as a claim left open by *Osborne* that challenges the application of Texas procedures—*i.e.*, the Texas state courts' article 64 rulings—to his case. *Skinner*, 2010 WL 273143, *3-*5; see also Switzer Br. in Opp. 17-18. The Court need not reward this strategy by pretending that Skinner's claims, as currently articulated, do not have insurmountable *Rooker-Feldman* problems. Instead, the Court "has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (citations omitted).

tack. His brief makes not one single assertion of unconstitutional conduct against Lynn Switzer, and he purports instead to challenge the CCA's denials of his motions to obtain DNA evidence as "arbitrary and capricious" and "irrational." Pet. 6-7, 29. See Switzer Br. in Opp. 17 (noting that Skinner previously "affirmatively disclaimed" the claims he now seeks to present). Even if Skinner were permitted to reinvent his claims in this Court, his newly asserted as-applied challenge is a poor vehicle for the Court's consideration of the issues presented because Switzer is not the appropriate defendant.

A. Skinner Is Asserting New Claims and Arguments He Never Raised in the Lower Courts.

Skinner's complaint and his briefing in this Court state different contradictory claims. Skinner's complaint alleges Switzer's own actions violated his due process rights; it contains no as-applied challenges to the state-court article 64 decisions and, in the district court, Skinner responded to arguments that his claims were barred by *Rooker-Feldman* by expressly disclaiming that he was asserting any such as-applied challenge.

Once Skinner cleared the district court and *Rooker-Feldman*, he faced a new barrier because *Osborne* rules out any freestanding right to access DNA evidence. See *Osborne*, 129 S.Ct., at 2322-2323. So in response to *Osborne*, Skinner now suggests that he has been "denied his federal constitutional right to fundamental fairness in the process by which the State denied his state-law claim." Skinner Br. 30. But this is precisely the claim that he disavowed in the lower court proceedings and that the magistrate and the district court consequently declined to consider. See J.A. 34. Although Skinner suggests that his "as-applied challenges may be accurately evaluated by the district court on remand," Pet. 29, as-applied challenges have never been a part of this case. The contradictions in this record make this a poor case to resolve the questions left by *Heck* and a good candidate for dismissal as improvidently granted. See, *e.g.*, *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416-417 (2001) (refusing to consider a question not raised or addressed in the court of appeals below).

B. Switzer Is Not the Appropriate Defendant for Skinner's As-Applied Challenge.

Even if this Court overlooks Skinner's contradictory claims, the current posture of the case may make resolution of the question presented purely "advisory or academic." *Medellin* v. *Dretke*, 544 U.S. 660, 664 (2005); See also *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation.") If Skinner now wishes to bring an as-applied challenge to the state courts' determinations, he has not stated an adequate claim under §1983, because doing so would require a different defendant.

To state a valid claim under §1983, the plaintiff must allege that the defendant has deprived him of a federal right. 42 U.S.C. §1983. Lynn Switzer is the defendant (in her official capacity). Skinner's claims in his complaint against Switzer allege that she herself is violating his rights by refusing to provide access to evidence. See Resp. Mot. Dismiss 5 ("Mr. Skinner's injury is caused by the Defendant's refusal to provide requested access to the physical evidence for DNA testing despite the fact that such testing might well produce exculpatory results—an injury that existed prior to the state court judgment."). But the theory underlying this claim was rejected in *Osborne*—there is no freestanding right to access DNA evidence that a district attorney can violate by refusing to provide access. *Osborne*, 129 S.Ct., at 2322-2323.

Recognizing this, Skinner in this Court attempts to attack the state's procedures. He has not challenged the facial constitutionality of article 64. See Resp. Mot. Dismiss 13 (explaining that, "[a]s in *Osborne*, the State's procedures appear 'adequate on their face.'"). Rather, he now claims that his alleged constitutional harm arises from how the CCA applied the statute, the argument that he expressly disavowed in the district court. See Pet. 6-7.

That alleged harm was not caused by Switzer. Because Skinner now wishes to assert that the allegedly arbitrary and capricious application of the statute to deny him testing deprived him of a constitutional right, the CCA would be the only appropriate defendant (but for the *Rooker-Feldman* bar). This is confirmed by his assertion that his claim accrued upon the CCA's decision. See Skinner Br. 6. See also *Savory* v. *Lyons*, 469 F.3d 667, 672 (CA7 2006) (noting that the plaintiff's §1983 claim accrued when "the Illinois circuit court denied Savory's request for DNA testing under Illinois law"). Nor did Switzer's acquiescence to the court's decision cause any constitutional harm or deprivation; she did not issue the state-court decisions Skinner now wishes to reverse and has done nothing but comply with court orders.

CONCLUSION

For these reasons, the judgment of the Fifth Circuit should be affirmed.

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In The
Supreme Court of the United States

◆

HENRY W. SKINNER,

Petitioner,

vs.

LYNN SWITZER,
District Attorney for the 31st Judicial District of Texas,

Respondent.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

◆

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED
(CAPITAL CASE)

May a convicted prisoner seeking access to biological evidence for DNA testing assert that claim in a civil rights action under 42 U.S.C. § 1983, or is such a claim cognizable only in a petition for writ of habeas corpus?

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INTRODUCTION

Rather than focus on the narrow question presented, Respondent spends much of her brief reciting her version of the facts of this case, apparently hoping to convince the Court with this one-sided presentation that Mr. Skinner is probably guilty and therefore the legal issue he presents is not worthy of the Court's time. (*See generally* Brief for Respondent ("RB") at 4-9, 35-37, 50-54.) Respondent's tendentious account of the facts omits numerous gaps, contradictions, and inconsistencies in the State's case against Mr. Skinner, and ignores the genuine and substantial questions about his guilt that could be conclusively and quickly resolved by DNA testing. But Mr. Skinner has already addressed these issues in detail (*see* Petition for Writ of Certiorari at 7-14; Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari at 3-4; *see also* Application for Stay of Execution Pending Consideration of Petition for Writ of Certiorari at 2-9, 18-22) and space limitations preclude repeating that discussion here. More to the point, the Court granted review to settle whether a prisoner may bring via 42 U.S.C. § 1983 a due process challenge to a state's DNA testing procedures as applied in his case, and it is to that question that we will devote this Reply.

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ARGUMENT

I. In Her Struggle to Bring This Case Within the *Heck* Exception, Respondent Misstates This Court's Precedents and Distorts the Impact Mr. Skinner's Claims Would Have on His Conviction.

The so-called *Heck* exception to the general rule that § 1983 suits lie to challenge any denial of constitutional rights by a state officer can be stated simply: If success on a state prisoner's § 1983 claim would "necessarily imply" the invalidity of his underlying conviction or sentence, then the claim may be pursued only in habeas. *See Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). (*See also* Brief for Petitioner ("PB") at 11-12.) Conversely, claims that, if successful, would *not* "necessarily imply" that the underlying conviction or sentence is invalid may proceed via § 1983. *See Heck*, 512 U.S. at 486-87.

Respondent does not ask this Court to overturn the rule in *Heck* or to fashion a different one for cases such as this.[1] Rather, she purports to embrace *Heck* and its progeny (*see, e.g.*, RB at 20) and labors to show why those cases bar Mr. Skinner's procedural due process claims for access to DNA evidence. In that effort, she distorts both the *Heck* test itself and the impact that success on Mr. Skinner's § 1983 claims would have on his underlying conviction. In addition, she resorts to a barrage of arguments about the merits of Mr. Skinner's civil rights lawsuit – issues never reached by the district court – that would be relevant only in the event of a reversal and remand, if then.

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[1] Thus, for example, Respondent does not attempt to rebut Mr. Skinner's argument that principles of *stare decisis*, comity, and separation of powers counsel the Court not to adopt a different rule for cases seeking access to DNA evidence. (*See* PB at 33-37.)

A. Respondent Misstates the *Heck* Exception.

After paying lip service to *Heck*'s "necessarily implies" test (*see* RB at 20), Respondent ignores that straightforward rule and instead switches indiscriminately among a number of alternative formulations – all being variations on the esoteric and ill-defined notion that Mr. Skinner's § 1983 case is barred because it is "inextricably connected" to a potential future attack on his conviction (RB at 26; *see also id.* (*Heck* applies because the § 1983 claims are "necessarily bound up" with attacking his conviction); *id.* at 29 (*Heck* applies because Mr. Skinner seeks evidence that may have a "material bearing" on his conviction); *id.* at 32 (the § 1983 claims are "inextricably intertwined with questions about the validity of his conviction and the conduct of the trial"); *id.* at 33 (the § 1983 claims are "inextricable from an attack on the evidence supporting the conviction and the conduct of the trial"); *id.* at 34 (if Mr. Skinner's claims succeed, the validity of his conviction will be "conditionally called into doubt")). Indeed, at every point where Respondent actually attempts to measure Mr. Skinner's claims against the supposed *Heck* standard, she uses one of these alternative formulations.

Respondent eschews use of the actual *Heck* standard apparently because she knows she cannot meet it. Instead, in the guise of being true to *Heck,* Respondent effectively embraces the "first step" test the Fourth Circuit applied in *Harvey v. Horan,* 278 F.3d 370, 375 (4th Cir. 2002), and the substantively identical "intertwined" test the Fifth Circuit innovated in *Kutzner v. Montgomery County,* 303 F.3d 339, 341 (5th Cir. 2002). Neither of those approaches, however, survives the plain implication of this Court's decision in *Wilkinson v. Dotson,* 544 U.S. 74 (2005): that there is a difference between a suit that would *itself,* if successful, necessarily imply the invalidity of the underlying conviction and one that, regardless of how it is characterized, merely seeks a ruling that might or might not ultimately prove useful in some separate proceeding to challenge the conviction. And the courts of appeals have given precisely that commonsensical reading to *Dotson* as applied in this context. (*See* PB at 21-23) (citing decisions uniformly rejecting the *Kutzner* approach in light of *Dotson*); *see also Harvey v. Horan,* 285 F.3d 298, 309 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) (characterizing as "inescapable" the conclusion that a "claim of a right of access to evidence is not one that in any respect" implies that the claimant's custody is unlawful). After *Dotson, Heck* cannot be read to bar a § 1983 claim seeking only access to DNA evidence.

Yet in the face of the plain language of *Heck* and *Dotson*, Respondent insists that Mr. Skinner's claim is barred by the Court's existing precedents. Indeed, she suggests that the precedent most like – and fully dispositive of – this case is *Heck* itself. (*See* RB at 20 ("*Heck* is the only time the Court has considered a putative § 1983 claim by a prisoner relating to the conduct of a trial and the evidence presented (as well as allegedly wrongly withheld) at the trial.").) In *Heck*, however, the prisoner sought monetary damages for the prosecutors' misconduct in producing an invalid conviction at trial; the Court understandably concluded that awarding such damages would require a finding necessarily implying that the prisoner's conviction had been wrongly obtained. *See Heck*, 512 U.S. at 483, 490. There is nothing remotely similar about this case, in which Mr. Skinner alleges nothing about the conduct of his trial and in which success would provide him access to DNA evidence for testing and nothing more.

Respondent even contends that her position is consistent with *Dotson*, which she attempts to distinguish by arguing that the prisoners in that case were challenging facially unconstitutional parole procedures and seeking a new hearing, whereas Mr. Skinner has never facially challenged Texas's DNA testing statute and the federal court could not order a new hearing under that statute. (RB at 32.) These differences, however, are immaterial to the question presented. The relevant point of *Dotson* – a point fatal to Respondent's position – is that a § 1983 case is not barred merely because the prisoner may use success in that case as a first step toward the ultimate relief from his sentence which he hopes to obtain in a separate action.[2]

B. Respondent Distorts the Impact That Success on Mr. Skinner's Claims Would Have on His Underlying Conviction.

Having adopted an overly loose interpretation of the relevant legal standard, Respondent compounds the error by offering an analysis of the facts that greatly overstates the effect success on Mr. Skinner's § 1983 claims would have on his underlying conviction.

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[2] Respondent also argues that Mr. Skinner's claims are like those in *Edwards v. Balisok*, 520 U.S. 641 (1997) (*see* RB at 32), where this Court held that a prisoner could not bring a claim for damages and declaratory relief under § 1983 based on allegations that his good time credits had been denied at a hearing in which the hearing officer excluded all exculpatory evidence and was biased and deceitful. In *Edwards*, however, the proceeding about which the prisoner complained in federal court was the very one in which his good time credits were denied; therefore a finding that the hearing officer had wrongly excluded evidence and was biased necessarily implied that the denial of the credits was invalid. *See Edwards*, 520 U.S. at 647 (stating that due process requirements for prison disciplinary proceedings "are not so lax as to let stand the decision of a biased hearing officer who dishonestly suppresses evidence of innocence"). Here, in contrast, the proceedings about which Mr. Skinner complains are not the ones in which his conviction or sentence were rendered.

Respondent recognizes that Mr. Skinner is not bringing a stand-alone claim against Respondent, but instead has challenged the constitutionally deficient procedures by which the Texas Court of Criminal Appeals ("CCA") refused to permit DNA testing under Texas's post-conviction DNA testing law, Article 64 of the Texas Code of Criminal Procedure ("art. 64"). In an effort to convert Mr. Skinner's legitimate challenge to procedurally deficient procedures into an attack on his underlying conviction, Respondent mischaracterizes the provisions of art. 64 beyond recognition. Most notably, she asserts that "[t]he art[.] 64 right exists only by virtue of an assertion in 'the convicting court' that the conviction is invalid." (RB at 31.) Art. 64 provides nothing of the kind.

The only provisions of art. 64 that even touch on the question of the defendant's factual guilt, much less the legal validity of his conviction, are:

- art. 64.03(a)(2)(A), which requires a convicted person seeking testing to show by a preponderance of the evidence that he "would not have been convicted if exculpatory results had been obtained through DNA testing," Tex. Code Crim. Proc. Ann. art. 64.03(a)(2)(A) (Vernon 2006 & Supp. 2009), and
- art. 64.04, which provides that if DNA testing is ordered and results are obtained, "the convicting court shall hold a hearing and make a finding as to whether, had the results been available during the trial of the offense,

> it is reasonably probable that the person would not have been convicted," *id.* art. 64.04.

A showing under the former provision falls far short of implying that the prisoner's underlying conviction is invalid. Under this provision, a court must *assume* that the DNA test results will be exculpatory. *See Routier v. State*, 273 S.W.3d 241, 257 (Tex. Crim. App. 2008) ("[W]e must assume (without deciding, of course) that the results of all of the post-conviction DNA testing .... would prove favorable to her."). There is, of course, no assurance that they will be exculpatory – nor could there be, prior to testing.

The latter provision comes into play only if DNA testing has been ordered *and* results – exculpatory or not – have been obtained. In that event, the convicting court must hold a hearing and determine whether it is reasonably probable that, had these results been available at trial, the defendant would not have been convicted. Of course, such a finding will depend on the nature of the results. And, even if the results are so exculpatory that such a finding is made, that *still* does not invalidate the movant's underlying conviction or even imply its invalidity. Because art. 64.04 does not give the convicting court authority to overturn a conviction, the prisoner still must bring a habeas proceeding to challenge the conviction. *See, e.g.*, *Ard v. State*, 191 S.W.3d 342, 344 (Tex. App. 2006) (stating that art. 64 "allows a convicted person to obtain a certain type of evidence that can then be used in a state or federal habeas corpus proceeding").

If, as Respondent suggests, "it is dubious whether there is a cognizable federal [habeas] claim for actual innocence" (RB at 30 n.8), then the prisoner would be left trying to find some way, subject to the procedural restrictions of habeas, to use the convicting court's art. 64.04 finding to support a claim in federal or state court that his trial was constitutionally defective. Indeed, even if Mr. Skinner obtained a favorable art. 64.04 probability finding *and* this Court were to endorse actual innocence as a valid ground for habeas relief, a determination that his conviction was invalid still would be far from assured.[3]

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[3] In support of its argument that art. 64 proceedings address the validity of the underlying conviction, Respondent cites *Hutson v. Quarterman*, 508 F.3d 236 (5th Cir. 2007), in which the Fifth Circuit held that art. 64 proceedings constitute "other collateral review" under 28 U.S.C. § 2244(d)(1) for purposes of determining when the one-year statute of limitations for federal habeas petitions begins to run. *Hutson* held that, because art. 64 proceedings could play an important role in the state post-conviction review process, interests of comity required giving those proceedings a full opportunity to run their course. *See Hutson*, 508 F.3d at 239-40. But the court did not hold that a prisoner could obtain invalidation of his conviction through art. 64 proceedings alone – nor could it have, given the plain language of the statute. Furthermore, as Mr. Skinner has pointed out, other circuits have reached a different conclusion with regard to whether proceedings under similar DNA testing statutes in other states toll the federal statute of limitations. (*See* PB at 30-31); *see also Price v. Pierce*, No. 08-1401, 2010 WL 3189427, at *6-7 (7th Cir. Aug. 13, 2010) (discussing circuit court decisions examining the tolling effect of state DNA statutes and declining to follow *Hutson*). Indeed, perhaps the best explanation for the Fifth Circuit's *Hutson* holding that an art. 64

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Furthermore, Respondent's argument ignores the very real possibility that if Mr. Skinner ultimately obtains relief from his death sentence, it will come in the form of executive clemency rather than through judicial invalidation of his conviction. *See, e.g.*, *Routier*, 273 S.W.3d at 259 n.76 (noting that, where DNA testing results obtained pursuant to art. 64 motion are insufficient to meet high habeas standard, "[it] does not render the DNA testing useless" because prisoner "may still present such evidence to the executive branch . . . in the form of a clemency petition"). It is well established in Texas and elsewhere that clemency is a form of executive mercy that does not invalidate the underlying conviction. *See, e.g.*, *Groseclose v. Plummer,* 106 F.2d 311, 313 (9th Cir. 1939) (addressing the effect of a Texas pardon); *Dixon v. McMullen,* 527 F. Supp. 711, 716-19 (N.D. Tex. 1981) (same); *Watkins v. State,* 572 S.W.2d 339, 341-42 (Tex. Crim. App. 1978) (same); *see also In re Sang Man Shin,* 206 P.3d 91, 92-97, 98 (Nev. 2009) (canvassing case law nationwide concerning the effect of a pardon on an underlying conviction and concluding that "the effect of the pardon does not erase the historical fact of the conviction").

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proceeding will toll the federal habeas statute of limitations is that it was influenced by the same court's erroneous reasoning, expressed in *Kutzner* and this case, that any proceeding that could constitute the first step toward a future collateral attack on a conviction is, itself, a collateral attack.

Thus, when the Court penetrates the thicket of Respondent's "inextricably intertwined" rhetoric and actually examines Texas's procedures for DNA testing and the avenues available for judicial or executive relief, it can only conclude that Mr. Skinner's § 1983 claims would not, even if successful, necessarily imply that his conviction is invalid. He will only have succeeded in gaining access to evidence so that it can be tested – just the first step on an arduous path toward his ultimate goal of relief from his conviction. That result falls far short of triggering the *Heck* exception.[4]

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[4] Respondent's contention that Mr. Skinner's effort to secure DNA testing "falls within the core of habeas" (RB at 26 (citation and internal quotation marks omitted)), is also hard to square with the Justice for All Act, H.R. 5107, 108th Cong. (2004), enacted by Congress in 2004. In adopting that statute, which created a vehicle for federal prisoners to seek DNA testing and provided incentives for States to enact comparable DNA testing statutes, Congress conspicuously did not place those provisions into the federal habeas statutes. Nor did Congress choose, in crafting that Act, to condition a prisoner's right to seek DNA testing on the availability of a remedy in federal habeas, impose a statute of limitations for seeking testing, or foreclose successive requests for testing. Congress's treatment of post-conviction DNA testing in the Justice for All Act refutes any notion that it considers litigation over access to DNA testing to lie at the "core" of habeas corpus.

II. Many of Respondent's Arguments Have No Bearing on the Issue Before the Court.

Respondent devotes several pages to defending the CCA's decisions denying Mr. Skinner DNA testing and speculating about the lengths to which the district court purportedly would have to go in order to sustain Mr. Skinner's procedural due process challenge. (*See* RB at 34-40.) Putting aside Respondent's skewed characterization of the evidence,[6] this entire line of argument is irrelevant to the narrow issue on which the Court granted certiorari. The question presented by this case in its present posture is not whether the CCA properly weighed the evidence or even, as Mr. Skinner alleges, acted in such a way as to deny Mr. Skinner fundamental due process rights. Rather, the issue now before the Court is whether *Heck* bars Mr. Skinner from even making these arguments in a federal § 1983 action. Respondent will have a full opportunity on remand to defend the CCA's "reasonable probability" and "no fault" findings against Mr. Skinner's claim of constitutional error.

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[6] *See Dist. Att'y's Office v. Osborne*, 129 S. Ct. 2308, 2337 (2009) (Stevens, J., dissenting) (noting that DNA evidence has led to exonerations not only in cases where the evidence of guilt was weak but also in cases where, prior to DNA testing, it appeared "overwhelming"); *see also id.* at 2337 n.9 (citing Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 109 (2008)).

III. This Court Has Already Struck a Balance Between Habeas and § 1983 That Properly Accommodates the Interests of Comity and Federalism.

Respondent complains that if the Court permits Mr. Skinner to pursue his procedural due process claim via § 1983 rather than habeas, it will "disrupt the state-federal balance Congress has implemented and this Court has striven to maintain, by allowing post-conviction evidentiary attacks on state court convictions without any of the restrictions . . . imposed on such attempts." (RB at 41-42.) But these concerns depend entirely on Respondent's inaccurate characterization of Mr. Skinner's civil action as an "attack[ ] on [a] state court conviction[ ]" (*id.*; *see also id.* at 42 (calling Mr. Skinner's suit a "collateral attack" and accusing him of seeking federal intervention "to upset [his] state court conviction" (citation omitted)); *id.* at 43 (insisting that Mr. Skinner seeks to undo a "'state criminal adjudication[ ]'" (citation omitted))). Respondent ignores this Court's explicit recognition that when it formulated the *Heck* test, it "already placed the States' important comity considerations in the balance, weighed them against the competing need to vindicate federal rights without exhaustion, and concluded that prisoners may bring their claims without fully exhausting state-court remedies so long as their suits, if established, would not necessarily invalidate state-imposed confinement." *Dotson*, 544 U.S. at 84. Because Mr. Skinner's procedural due process claim, if successful, would not "necessarily invalidate [his] state-imposed confinement," *id.*, it poses none of the threats to comity against which Respondent warns.

Equally important, the concern claimed by Respondent and several *amici* that the law should not encourage a state prisoner to make an "end run" around state proceedings by taking his complaint to federal court in the first instance, is in no way implicated by cases like Mr. Skinner's. To have a colorable federal due process claim against state officials for denying him DNA testing under provisions of state law, a state prisoner must first attempt to invoke those provisions. *See Dist. Att'y's Office v. Osborne*, 129 S. Ct. 2308, 2321 (2009). Thus, *Osborne* itself forecloses the "end run" feared by Respondent and *amici*.

Respondent also wrongly accuses Mr. Skinner of "grievously misread[ing] *Osborne*" by finding in that decision recognition of "a separate [§] 1983 suit attacking state-court determinations under the applicable state . . . statutes." (RB at 44.) Mr. Skinner does not suggest that the Court in *Osborne* promised a federal forum in which state prisoners routinely could re-litigate whether those state-court determinations were correct. Instead, Mr. Skinner understands *Osborne* to have narrowly limited prisoner challenges to a state's failure to allow post-conviction access to DNA evidence to those rare instances in which the state has denied fundamental fairness when applying its own procedures.[6] Recognizing that aspect of *Osborne* does not "eviscerate" that decision (RB at 44) but simply harmonizes *Osborne*'s "support for the primacy of state procedures in DNA testing" (*id.*) with the long-standing legal principle that procedural due process requirements pertain where liberty interests are created by state law.[7]

Respondent and the supporting *amici* offer a farrago of "harmful practical consequences" that they imagine will result if the Court allows Mr. Skinner's claim to proceed under § 1983. (*See, e.g.*, RB at 45) (claiming variously that such a holding would "undermine finality," "promote inefficiency," and "increase costs"); *id.* at 45-48.) These speculations are unfounded. For example, Respondent complains that "a proliferation of new suits" can be expected to deluge the federal courts if Mr. Skinner should prevail. But, as Mr. Skinner has pointed out, no such "proliferation" has materialized to date, notwithstanding the recognition by the substantial majority of federal circuits that the *Heck* exception does not apply to such suits. (PB at 31-32); *see also* Colin Starger, *The DNA of an Argument: A Case Study in Legal Logos*, 99 J. Crim. L. & Criminology 1045, 1050 (2009) (finding only 21 cases published or available on Westlaw nationwide between 2000 and 2008 in which a prisoner sought post-conviction DNA testing via a § 1983 action).[8] In addition, this Court's decision in *Osborne* has greatly circumscribed the opportunity for filing such claims, and Congress has given the federal courts numerous tools with which to speedily identify and dismiss insubstantial claims by prisoner plaintiffs and impose sanctions to deter misuse of the legal process. (*See* PB at 32 (citing statutes).) Respondent and *amici* have not shown that these provisions are inadequate to the task. Nor have they shown that the alternative – depriving potentially innocent prisoners of any meaningful means to challenge a state's denial of DNA testing, no matter how arbitrarily or unfairly its procedures may have been applied – is justified by the minimal burden such cases have imposed on the federal courts to date. Similarly, Respondent's complaint that allowing such suits would "promote inefficiency" by "encourag[ing] piecemeal litigation of claims that should be adjudicated holistically in one habeas proceeding" (RB at 46) once again blurs the key distinction upon which this Court's *Heck* jurisprudence rests. Claims for access to evidence, as such, cannot be adjudicated at all in a habeas proceeding – "holistically" or otherwise – because the only claims cognizable in habeas are those through which a prisoner "seeks either 'immediate release from prison,' or the 'shortening' of his term of confinement." *Dotson*, 544 U.S. at 79 (citation omitted). Because Mr. Skinner's due process claim does not fit that description, Respondent's criticism is inapposite.

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[6] Mr. Skinner is not alone in his reading of *Osborne*. The Third Circuit, for example, has agreed that "[t]he [*Osborne*] Court . . . envisioned a plaintiff like Grier, who availed himself of state procedures without success and [then] claims a due process violation precisely because of that failure." *Grier v. Klem*, 591 F.3d 672, 679 (3d Cir. 2010).

[7] In *Osborne*, the United States appeared as *amicus curiae*, urging the Court not to recognize any substantive due process right to post-conviction DNA testing (and declining to address the *Heck* issue common to both *Osborne* and Mr. Skinner's case). *See generally* Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Dist. Att'y's Office v. Osborne*, 129 S. Ct. 2308 (2009) (No. 08-6), 2008 WL 5451774. If the United States viewed the holding Mr. Skinner requests as undermining in any way the ruling it sought and obtained in *Osborne*, the Solicitor General would have joined Respondent's chorus of *amici* here. The Government's silence speaks for itself.

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[8] Respondent and *amici* even go so far as to suggest that a holding for Mr. Skinner on the *Heck* issue would open the gate to "free roving postconviction discovery efforts" – such as demands to analyze voice recordings – "under the guise of § 1983 lawsuits." (RB at 48.) Again, the ruling Mr. Skinner is seeking here has been the law in most circuits for a good part of the last decade, and Respondent and her *amici* point to no evidence that it has spawned any – much less a proliferation of – such lawsuits.

IV. Mr. Skinner's § 1983 Action Is Not Jurisdictionally Barred by the *Rooker-Feldman* Doctrine.

Respondent substantially overstates the reach of the *Rooker-Feldman* doctrine and wrongly asserts that it bars Mr. Skinner's due process claim. As this Court emphasized in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), the *Rooker-Feldman* doctrine is narrow in scope and has been applied too broadly in the past by lower federal courts. As the Court said in *Exxon*, "[i]f a federal plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . . , then there is jurisdiction,'" notwithstanding *Rooker-Feldman*. *Id.* at 293 (second and third alteration in original) (citation omitted). In short, this Court made it plain in *Exxon* that *Rooker-Feldman* does not bar a federal action merely because it follows state proceedings involving a similar – or indeed, as in *Exxon*, the identical – dispute.

Rooker-Feldman is not applicable here because Mr. Skinner's claims – while growing out of the CCA's decisions denying his art. 64 motions – were never litigated or decided by the CCA. The only issue litigated in state court – whether Mr. Skinner was entitled to DNA testing under Texas's art. 64 – was entirely a state law issue. A federal constitutional issue arose only because the CCA's decisions regarding that state law issue turned out to be so arbitrary and unreasonable as to deny Mr. Skinner's federal due process rights. The questions raised by Mr. Skinner's § 1983 action are, to be sure, closely related to the state court rulings, but Respondent admits – indeed complains (RB at 17) – that they were never addressed or decided in those rulings. Because Mr. Skinner's due process claims were not litigated in state court, it necessarily follows that the district court's consideration of those claims cannot constitute review of a state court decision; thus, none of the limits the *Rooker-Feldman* doctrine is designed to enforce are implicated here.[9]

Whether Mr. Skinner's claims *should* have been litigated in state court is an entirely separate question. Even if they should have been, the failure to do so at most raises *res judicata* or other preclusion issues, which are not jurisdictional. *See Exxon,* 544 U.S. at 293 (holding that federal court claim presented, at most, preclusion issues and that "[p]reclusion, of course, is not a jurisdictional matter"). The district court has already held that *res judicata* does not bar the claims alleged in Mr. Skinner's complaint. (*See* Joint Appendix ("JA") at 40.) To the extent other preclusion issues remain, they may be addressed by that court on remand.

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[9] This result is particularly appropriate where, as here, there exists considerable doubt as to whether the CCA would have even entertained his federal constitutional claim as part of the art. 64 proceeding. *See Cervantes v. City of Harvey*, 373 F. Supp. 2d 815, 819-20 (N.D. Ill. 2005) (finding *Exxon*'s "independent claim" exception to apply where "there was no 'reasonable opportunity' to raise the claim in . . . state court"). While the issue has apparently never been addressed by the CCA, decisions of Texas's intermediate appellate courts suggest that a constitutional challenge to art. 64 procedures cannot be brought in an art. 64 proceeding itself but must be brought in a separate habeas proceeding. *See, e.g., Chavez v. State*, 132 S.W.3d 509, 510 (Tex. App. 2004) (finding no jurisdiction to review prisoner's due process claim during appeal of unsuccessful art. 64 motion, because such claim "amounts to a request for habeas relief"); *Evans v. Eldridge*, No. 13-08-00634-CV, 2009 WL 2462893, at *3 (Tex. App. Aug. 13, 2009) (relying on Fifth Circuit's *Kutzner* analysis to determine that due process challenge to art. 64 procedures was cognizable exclusively in a habeas corpus proceeding); *but see Christ v. State*, No. 14-08-00902-CR, 2009 WL 5227884, at *1-2 (Tex. App. Sept. 1, 2009) (entertaining in an art. 64 proceeding facial due process challenge to art. 64 without addressing jurisdiction to do so).

Finally, accepting Respondent's *Rooker-Feldman* argument would render the decision in *Osborne* a Catch-22; for no prisoner could do what *Osborne* expressly directs – "try[ ]" the state's procedures before "complain[ing] that they do not work in practice," 129 S. Ct. at 2321 – without forfeiting his right to seek a remedy in federal court if those procedures proved constitutionally defective. Surely the law does not require such a perverse result.[10]

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[10] Nor does Respondent's contention that Mr. Skinner should have sought review in this Court after the CCA denied his art. 64 motions merit consideration. As discussed above, it is questionable whether the CCA would have entertained such a due process challenge during those proceedings; had it determined that the challenge had to be brought in habeas, such a ruling would, in turn, have blocked Mr. Skinner from bringing his due process claims to this Court. *See, e.g.*, *Street v. New York*, 394 U.S. 576, 582 (1969) (unless a federal question was decided by the state court, the Supreme Court "ha[s] no power to consider it." (citing 28 U.S.C. §§ 1257(2), 1257(3)). Furthermore, Respondent, in essence, is arguing that Mr. Skinner should have fully exhausted every last step of his state-court remedies before filing a § 1983 action in federal court, a requirement this Court expressly rejected long ago. *See Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 500-50 (1982); *see also Osborne*, 129 S. Ct. at 2321 (citation omitted).

V. Respondent's Plea for Dismissal of the Writ as Improvidently Granted Has No Merit.

Lacking any persuasive basis for arguing that this case falls within the *Heck* exception, Respondent advances two procedural issues in a last-ditch attempt to persuade the Court to dismiss the writ as improvidently granted. (RB at 50-53.) But Respondent has already had a full opportunity to – and did – raise these issues prior to the certiorari grant. And the Court, after re-listing the petition no fewer than five times, took them into account before ultimately granting the writ. This resolves the matter. The Court should not be deterred from now deciding the question presented. *See Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 521, 559 (1957) (Harlan, J., concurring in part and dissenting in part) ("[O]nce certiorari has been granted a case should be disposed of on the premise that it is properly here, in the absence of considerations appearing which were not manifest or fully apprehended at the time certiorari was granted.").

Nor do Respondent's alleged procedural issues have any merit. The question presented comes to the Court unburdened by collateral issues because the district court swiftly dismissed Mr. Skinner's lawsuit solely on *Heck* grounds, before Respondent even joined issue by answering the complaint, and the Fifth Circuit summarily affirmed based on its own well-settled view of *Heck*. The single legal question on which the ruling below turned remains the subject of a longstanding circuit conflict which the Court previously agreed to resolve but did not reach. *See*

Osborne, 129 S. Ct. at 2919. At most, Respondent's complaints relate to matters which might properly be the subject of further litigation on remand once this Court resolves the threshold *Heck* issue, but none of them affect either this Court's power to decide the question presented or the wisdom of using this case to do so. To defer again resolution of an issue now twice fully briefed and argued – on which guidance is much needed[11] – would be a poor use of the Court's judicial resources.

Respondent's accusations that there exists a "disconnect between [Mr. Skinner's] complaint and his current arguments" (RB at 50) and that he has sued the wrong party and changed his fundamental theory of liability (*id.* at 52-53) are baseless. Mr. Skinner alleged at length in his complaint the manner in which the CCA had acted arbitrarily and unconstitutionally in upholding Respondent's refusal to grant him access to the requested evidence. (*See* JA at 14-17, 18-20.) Further, he attributed Respondent's refusal to provide him access to the requested evidence to her reliance on those court decisions. (*Id.* at 20.) Mr. Skinner has advanced that theory consistently in this case. *See, e.g.*, Brief in Support of Plaintiff's

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[11] Although supporting Respondent in virtually every other respect, *amicus curiae* National District Attorneys Association urges the Court to *decline* Respondent's invitation to dismiss the writ as improvidently granted, arguing that the Court should "provide clarity that is needed throughout the country." (Brief of *Amicus Curiae* National District Attorneys Association at 30 n.15.)

Motion for Preliminary Injunction, *Skinner v. Switzer*, No. 2:09-CV-00281-J-BB (N.D. Tex. Nov. 30, 2009) (Dkt. 8) at 30-31 (alleging that "[t]he CCA's failure to grant [the requested DNA testing in Mr. Skinner's initial art. 64 proceeding] . . . so lacks any justification that it 'can properly be characterized as arbitrary,' [and thus] violates due process"); *id.* at 45 (alleging that the CCA's finding that the statute's 'no-fault' provision justified upholding Respondent's denial of testing in Mr. Skinner's second art. 64 proceeding was "both arbitrary and unreasonable"). The record thus belies Respondent's claim that Mr. Skinner has tried to work any "bait and switch" on this Court.

Finally, Respondent's claim that "Switzer is not the appropriate defendant" for Mr. Skinner's civil action (RB at 52-53) likewise misses the mark. Mr. Skinner sued Ms. Switzer, now the head of the office that prosecuted him at trial, because she is the state official who has custody of the evidence he seeks to have tested. *See Grier v. Klem*, 591 F.3d 672, 676 n.4 (3d Cir. 2010) (district attorney, as custodian of the evidence, is proper defendant in § 1983 action seeking DNA testing). Her role in this case thus is analogous to that of the prison official named as the respondent in a habeas action: While said official typically had no role in the constitutional violations that resulted in the prisoner's allegedly unlawful incarceration, he or she is nevertheless the appropriate defendant as custodian of the prisoner. *Cf.* 28 U.S.C. § 2243 (stating that a writ or show-cause order in a federal habeas proceeding "shall be directed to the person having custody of the person detained"). At the same time, however, Mr. Skinner has consistently recognized that, after *Osborne*, his only federally enforceable right is to procedural due process in the application of Texas's DNA testing statute to the circumstances of his case. That right was denied by the CCA's arbitrary rejection of Mr. Skinner's art. 64 motions, a violation only perpetuated by Respondent's reliance on those decisions in continuing to refuse access to the evidence in her possession. Thus, the Court need not be detained by Respondent's suggestion that Mr. Skinner might have sued the wrong party.

◆

CONCLUSION

For the reasons stated herein and in Mr. Skinner's initial brief, the judgment of the Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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CAPITAL CASE
No. 09-9000

IN THE

Supreme Court of the United States

HENRY W. SKINNER,
Petitioner,

v.

LYNN SWITZER, DISTRICT ATTORNEY FOR THE
31ST JUDICIAL DISTRICT OF TEXAS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE STATES OF ALASKA, ARIZONA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, KANSAS, LOUISIANA, MARYLAND, MISSISSIPPI, NEBRASKA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, WASHINGTON, WYOMING, COMMONWEALTH OF NORTHERN MARIANA ISLANDS AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Henry Skinner was convicted of a triple murder in Texas. After unsuccessfully invoking the state procedure for seeking postconviction DNA testing of evidence, he filed a complaint under 42 U.S.C. § 1983, alleging that denying him access to the evidence was fundamentally unfair. The district court dismissed his complaint, ruling that his claim was not cognizable under § 1983 but had to be asserted in a federal habeas petition. The question presented is:

May a convicted prisoner seeking access to biological evidence for DNA testing assert that claim in a civil rights action under § 1983, or is such a claim cognizable only in a petition for writ of habeas corpus?

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INTEREST OF *AMICI CURIAE*

The States have a fundamental interest in the integrity of their laws and, more specifically, in the effectiveness of their laws and rules governing postconviction access to evidence. This federalism concern is not speculative: 48 states have enacted postconviction DNA testing statutes. Allowing a prisoner to challenge a state official's denial of access to evidence by way of a § 1983 claim in federal court – unrelated to any specific constitutional objection to the procedures available to the prisoner under state law – would severely undermine these state laws and would challenge state sovereignty by substituting federal district courts for state courts as overseers of the state postconviction process.

In addition, the States have an obvious interest in conserving their scarce resources. Skinner's approach would substantially increase the amount of postconviction litigation to which States must respond. It would also require diversion of state resources to respond to the increase in the overall amount of discovery, which would be the natural outcome of a rule allowing prisoners to demand evidence that is untethered to any substantive claim for relief. The impact on state resources is by no means *de minimus* and would include the diversion of resources for the additional evidence handling and processing that would undoubtedly result from that litigation.

The Texas DNA law, like the laws of the 47 other states that have adopted statutory procedures for postconviction DNA testing, allows prisoners a fair opportunity to obtain testing that would establish a reasonable probability of innocence. Henry Skinner took advantage of that opportunity but failed to show that the testing he seeks could establish a reasonable probability of innocence. He now seeks to use § 1983 to obtain the evidence. To allow this type of procedural legerdemain would both diminish the sovereign interests of the States and at the same time impose a significant burden on states' limited law enforcement resources.

The carefully-crafted postconviction DNA laws of the States balance the needs of justice, finality, and the mandates of the Constitution, in accord with the individual needs of each State. These statutes represent the best efforts of the several States to grapple with the changing legal landscape occasioned by the growing availability and sophistication of DNA testing. In the absence of a particularized showing that the application of a state statute has fundamentally failed to provide due process to a litigant, there is neither a need nor any policy justification for this Court to, in effect, abrogate the legislative efforts of the States in favor of a federalized, judge-driven legal doctrine. While the *Amici* recognize that, potentially, there might someday be a case in which a state statutory scheme so fundamentally fails an innocent prisoner that the interests of justice would require this Court to review the matter further, this is not that case. Skinner does not specifically allege in his complaint that the laws of the State of Texas have failed him. Instead, he seeks a judge-crafted remedy that he hopes will be more favorable to him than the carefully-balanced statutory procedure enacted by the legislature in his jurisdiction. Sound principles of federalism and judicial restraint demand that this Court reject Skinner's invitation.

SUMMARY OF ARGUMENT

A fundamental principle of this Court's federalism jurisprudence is that a state prisoner may not use federal litigation to avoid otherwise valid state laws and procedures. If permitted by this Court, Skinner's suit would vitiate this principle and undermine state sovereignty.

Skinner twice sought, under a state law specifically intended for obtaining postconviction DNA testing, the evidence he seeks in his § 1983 action, and he was twice denied in state court. In seeking relief in federal district court, Skinner did not allege any specific constitutional defect in the state law or state court proceedings. In fact, he expressly disclaimed any allegations to that effect. He claimed only that Switzer's denial of access to the evidence was fundamentally unfair. Allowing Skinner to use § 1983 to do an end-run around valid state procedures negates those procedures and vests in federal courts control over the discovery of evidence relevant to a claim for state postconviction relief.

Last, Skinner has misappropriated this Court's discussion, in *District Attorney's Office v. Osborne*, of the importance of availing himself of state postconviction procedures before challenging their constitutional validity as applied. In that discussion, the Court merely pointed out the obvious: one cannot challenge a state procedure as applied until the procedure has been applied. Skinner has not asserted a specific as-applied challenge to the constitutionality of the state procedures available to him. Therefore, his unsuccessful invocation of those procedures proves nothing.

ARGUMENT

Skinner is attempting to use 42 U.S.C. § 1983 as a vehicle for obtaining discovery relating to a frontal attack on his state convictions. But his proposed access-to-evidence claim improperly circumvents the existing DNA testing law in his state. Allowing such suits would undermine the state-federal balance governing federal review of state criminal convictions, with significant negative effects for the States.

A. SKINNER'S ACCESS-TO-EVIDENCE CLAIM IMPROPERLY CIRCUMVENTS STATE DNA TESTING LAWS AND DISCOVERY RULES

Skinner's use of § 1983 to obtain access to evidence would allow Skinner to avoid legitimate state laws and court rules regulating discovery and access to evidence. In this respect, Skinner's approach upsets the delicate state-federal balance struck by both Congress and this Court for federal review of state criminal convictions. Federalism concerns animate many aspects of federal habeas jurisprudence. *See Boumediene v. Bush*, 128 S.Ct. 2229, 2268 (2008) (habeas framework "respects federalism" by deferring to state courts' factual findings and requiring exhaustion of state remedies, which are "justified" by the assumption that state courts normally provide fair trials to defendants); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (federal habeas review is unavailable when state-court decision rests on independent state-law ground that is adequate to support judgment); *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (doctrines of procedural default and abuse-of-writ both "seek to vindicate the State's interest in the finality of its criminal judgments").

These same concerns are mirrored in Congress's 1996 amendments to the habeas statute. *See* Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 104, 100 Stat. 1214, 1219. Significant among the amendments is the requirement that federal habeas courts give substantial deference to the factual and legal determinations of state courts. *See* 28 U.S.C. § 2254(d), (e). Congress's objective was "to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law," ***Williams (Terry) v. Taylor***, 529 U.S. 362, 386, 404 (2000), as well as "to further the principles of comity, finality, and federalism," ***Williams (Michael Wayne) v. Taylor***, 529 U.S. 420, 436 (2000). This Court has in fact cautioned that, although federal courts may be eager "to vindicate and protect federal rights and federal interests," they should do so only "in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

The federalism concerns at play here are particularly well illustrated by the procedural history of Skinner's case. Skinner filed two motions in the Texas courts seeking access to the DNA evidence under the Texas postconviction-DNA-testing law. *See Skinner v. State*, 122 S.W.3d 808, 809-10 (Tex. Crim. App. 2003); *Skinner v. State*, 293 S.W.3d 196, 200-01 (Tex. Crim App. 2009). The Texas courts rejected Skinner's first request because Skinner failed to meet the statutory requirement that he show a reasonable probability that the requested testing would prove his innocence. ***Skinner***, 122 S.W.3d at 811. The Texas courts rejected Skinner's second request because, contrary to the statute's explicit requirement of pretrial unavailability, the evidence had been available to Skinner and could have been tested prior to trial. ***Skinner***, 293 S.W.3d at 200. And because Skinner failed to show that his trial attorney was ineffective in failing to request testing prior to trial, he could not show that the failure to test was "through no fault" of his own or that "the interests of justice" required DNA testing. *Id.* at 201-09.

Skinner's § 1983 complaint does not allege any constitutional defect in the Texas statute on its face, nor does it allege that the Texas courts applied the statute in an unconstitutional fashion. J.A. 5-23. At most, Skinner disagreed with the Texas courts' characterization of the facts and the conclusions they drew from these facts – namely, the courts' estimation of the probability that the DNA testing would establish his innocence and whether previously available testing should be permitted in the interest of justice. J.A. 15-20. Skinner conceded this interpretation of his claims in his pleadings in the § 1983 action. J.A. 31-32 & n.1. As the district court noted, Skinner's "*complaint* does not challenge the constitutionality of Article 64 of the Texas Code of Criminal Procedure nor does it ask this Court to review the application of Article 64 by the [Texas Court of Criminal Appeals]'s judgments denying him access to the DNA evidence." J.A. 31 (emphasis in original). Instead, Skinner "affirmatively state[d] that he does not complain of injuries caused by any state court judgment" and he "reiterate[d] that the injury of which he complains, that is, the refusal of the defendant district attorney to provide access to DNA evidence, existed *prior to* the state court proceedings and, therefore, his injury *could not have been caused by* those proceedings." J.A. 31 n.1 (emphasis added).

In short, Skinner alleged that he had a federal constitutional right to the evidence not because the Texas procedures for obtaining the evidence were constitutionally deficient but because, according to Skinner, the result – denial of access – was fundamentally unfair. To allow such a claim to be brought through a § 1983 action, which does not include key federalism-based provisions incorporated in the federal habeas statute, would open the door to federal district court review of state court decisions under state DNA testing laws. It would also allow state prisoners to use federal courts to circumvent the restrictions placed on DNA testing requests by those state testing laws.[1] And they could do so without a single allegation that those state laws are constitutionally infirm. To permit this form of circumvention would leave these state DNA testing laws essentially toothless. More importantly, federal courts would be transformed into discovery masters, superintending the discovery of evidence intended for use in state court proceedings. This would disregard a fundamental federalism principle by unduly interfering with the legitimate activities of the States. *Younger*, 401 U.S. at 44.

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[1] Forty-eight States, plus the District of Columbia and the federal government, have enacted DNA testing statutes. *See* 18 U.S.C. § 3600; Ala. Code § 15-18-200 (LexisNexis Supp. 2009); 2010 Alaska Sess. Laws ch. 20, § 20, *codified as* Alaska Stat. § 12.73.010; Ariz. Rev. Stat. Ann. § 13-4240 (2010); Ark. Code Ann. § 16-112-202 (2006); Cal. Penal Code § 1405 (West Supp. 2010); Colo. Rev. Stat. Ann. § 18-1-412 (West Supp. 2009); Conn. Gen. Stat. Ann. § 52-582 (West 2005), § 54-102kk (West. 2009); Del. Code Ann., tit. 11, § 4504 (2007); D.C. Code Ann. § 22-4133 (LexisNexis 2010); Fla. Stat. Ann. § 925.11 (West Supp. 2010); Ga. Code Ann. § 5-5-41 (Supp. 2009); Haw. Rev. Stat. § 844D-121 to -123 (Supp. 2008); Idaho Code Ann. § 19-4902 (Supp. 2010); 725 Ill. Comp. Stat. Ann. § 5/116-3 (West 2008); Ind. Code Ann. § 35-38-7-1 to -5 (LexisNexis Supp. 2010); Iowa Code Ann. § 81.10 (West 2009); Kan. Stat. Ann. § 21-2512 (2007); Ky. Rev. Stat. Ann. § 422.285 (LexisNexis Supp. 2009); La. Code Crim. Proc. Ann. art. 926.1 (Supp. 2010); Me. Rev. Stat. Ann. tit. 15, § 2137 (Supp. 2009); Md. Code Ann., Crim. Proc. § 8-201 (LexisNexis Supp. 2009); Mich. Comp. Laws Ann. § 770.16 (West Supp. 2010); Minn. Stat. Ann. § 590.01 (West 2010); Miss. Code Ann. § 99-39-5 (Supp. 2009); Mo. Ann. Stat. § 547.035 (West 2002); Mont. Code Ann. § 46-21-110 (2009); Neb. Rev. Stat. Ann. § 29-4120 (LexisNexis 2009); Nev. Rev. Stat. Ann. § 176.0918 (LexisNexis 2009); N.H. Rev. Stat. Ann. § 651-D:2 (LexisNexis 2007); N.J. Stat. Ann. § 2A:84A-32a (West Supp. 2010); N.M. Stat. § 31-1A-2 (Supp. 2010); N.Y. Crim. Proc. Law § 440.30(1-a) (McKinney 2005); N.C. Gen. Stat. Ann. § 15A-269 (2009); N.D. Cent. Code § 29-32.1-15 (2006); Ohio Rev. Code Ann. § 2953.72 (West 2006); Or. Rev. Stat. § 138.690 to .696 (2009); 42 Pa. Cons. Stat. Ann. § 9543.1 (West 2007); R.I. Gen. Laws § 10-9.1-12 (Supp. 2009); S.C. Code Ann. § 17-28-30 (Supp. 2009); 2009 S.D. Sess. Laws ch. 120, § 1, *codified as*, S.D. Codified Laws § 23-5B-1; Tenn. Code Ann. § 40-30-303 to -304 (2006); Tex. Code Crim. Proc. Ann. arts. 64.01-64.03 (Vernon Supp. 2009); Utah Code Ann. § 78B-9-300 to -304 (2008); Vt.

B. THE *HECK* EXCEPTION IS NOT THE SOLE BASIS ON WHICH THIS COURT MAY REJECT A § 1983 CLAIM

Skinner focuses most of his attention on the standard adopted by this Court in *Heck v. Humphrey*, 512 U.S. 477 (1994), as later interpreted in cases such as *Edwards v. Balisok*, 520 U.S. 641 (1997), and *Wilkinson v. Dotson*, 544 U.S. 74 (2005). Pet. Br. 10-17. Skinner suggests that *Heck* is the *sole* basis upon which this Court may restrict state prisoners' § 1983 claims. He is mistaken.

In *Heck*, the Court elaborated on the principle articulated in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), that claims within the core of habeas corpus may not be asserted in a § 1983 action, explaining that a

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Stat. Ann. tit. 13, § 5561 (2009); Va. Code Ann. § 19.2-327.1 (2008); Wash. Rev. Code Ann. § 10.73.170 (West Supp. 2010); W. Va. Code Ann. § 15-2B-14 (LexisNexis 2009); Wis. Stat. Ann. § 974.07 (West. Supp. 2010); Wyo. Stat. Ann. § 7-12-303 (2009). Of the two remaining states, Massachusetts has addressed the issue through a court decision. *Commonwealth v. Donald*, 848 N.E.2d 447 (Mass. App. Ct. 2006). And Oklahoma has, by statute, created a DNA Forensic Testing Program to assist indigent prisoners in obtaining postconviction DNA testing. *See* Okla. Stat. Ann. tit. 22, § 1371.1 - .2 (West 2003 & Supp. 2010).

§ 1983 action would be barred where "a judgment in favor of the [prisoner] would necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487. From this, Skinner assumes that what has become known as the "*Heck* exception" – *i.e.*, claims that "necessarily imply" the invalidity of the conviction or sentence – is the sole basis upon which a court may reject a § 1983 claim asserted by a prisoner.

But nothing in *Heck* or the later cases discussing it suggests that the *Heck* exception stands alone. As explained in *Preiser*, this Court is concerned with the intersection of § 1983, whose broad language covers an extremely wide range of claims, and the federal habeas statute, whose more specific language would be engulfed and rendered a nullity if no limitations were placed on claims that arguably could be asserted under either statute. *Preiser*, 411 U.S. at 489-90. Skinner's complaint presents a similar concern but in a slightly different guise. While *Heck* involved a claim the proof of which necessarily implied the invalidity of the conviction, Skinner has taken a substantive claim (actual innocence) that unquestionably falls within the *Heck* exception and has split that claim into a procedural component, which he seeks to independently assert as a § 1983 claim, and a substantive component, which cannot be asserted as a § 1983 claim. Rejecting this type of artful pleading involves no modification or expansion of *Heck*; it merely prevents prisoners from avoiding the *Heck* exception through inappropriate piecemeal litigation.

A rule against piecemeal litigation of the type pursued by Skinner, moreover, would have application far beyond the context of prisoner litigation and is thus wholly independent of *Heck*. A rule against splitting discovery requests from the substantive claims to which those requests relate could apply to any litigation involving a State.[2] Even in traditional civil litigation, parties should not be permitted to obtain discovery from a State through a § 1983 action, thereby avoiding applicable discovery rules and any threshold procedural issues (such as the federal court's jurisdiction over the substantive claim to which the discovery relates). To hold otherwise would allow specious and wasteful discovery requests at what would be great expense to a State.

Relying on language from *Dotson*, Skinner also argues that the Court fully addressed *Amici*'s federalism concerns when it crafted the *Heck* exception. Pet. Br. 33-34. In *Dotson*, two prisoners sought declaratory and injunctive relief under § 1983, claiming that state parole procedures were unconstitutional on ex-post-facto and due-process grounds. Although the prisoners clearly hoped that success on their claims would result in their earlier release on parole, that result was in no way certain. The prisoners' procedural challenge did not implicate the substance of their eligibility for parole because the protections they sought were too remote to the decisions that would actually affect their eligibility or release. Success in the § 1983 action would provide the prisoners with, at most, opportunities for new or earlier parole hearings. *Dotson*, 544 U.S. at 82.

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[2] *Amici* acknowledge that this is a capital case and is thus "different." *Ring v. Arizona*, 536 U.S. 584, 605-06 (2002) ("As Arizona's counsel maintained at oral argument, there is no doubt that '[d]eath is different.'"); *see also Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (plurality opinion) (noting that majority of Court had "expressly recognized that death is a different kind of punishment from any other which may be imposed in this country"). The purely legal issue presented in this case, however, goes well beyond the capital cases. The effects of the rule sought by Skinner will be borne across the spectrum of criminal cases and may extend into civil cases as well.

In response, the State of Ohio argued that allowing a § 1983 action in this context would "break faith with principles of federal/state comity by opening the door to federal court without prior exhaustion of state-court remedies." *Dotson*, 544 U.S. at 84. This Court disagreed, explaining that its earlier cases – specifically, *Heck* and its progeny – have "already placed the States' important comity considerations in the balance, weighed them against the competing need to vindicate federal rights without exhaustion, and concluded that prisoners may bring their claims without fully exhausting state-court remedies so long as their suits, if established, would not necessarily invalidate state-imposed confinement." *Id.* From this language, Skinner argues that the comity concerns raised by *Amici* in this case have already been addressed by the Court and cannot be asserted to support an independent restriction on § 1983 jurisdiction. Pet. Br. 34.

But *Heck* and similar cases focused primarily on the States' interest in preventing federal courts from disturbing the finality of state criminal judgments. The "necessarily implied" exception adopted in those cases balances that interest against prisoners' interest in vindicating constitutional rights, as this Court stated in *Dotson*. *Dotson*, 544 U.S. at 84. Skinner's access-to-evidence claim raises an entirely different set of federalism concerns. As explained above, the States have an interest in the continuing vitality of their discovery rules and their postconviction-DNA-testing laws. This interest is especially significant where, as here, the prisoner is not challenging any specific aspect of state law or procedure, but merely argues that the end result – the legitimate denial of access – is fundamentally unfair.

For these reasons, Skinner's extended discussion of *Heck*, *Dotson*, and *stare decisis* adds nothing to his argument. Pet. Br. 33-37. Simply put, *Amici* are not asking the Court to modify or supersede *Heck* or any of its progeny. Thus, the requirements of *stare decisis* have not been triggered.

C. SEVERANCE OF DISCOVERY FROM SUBSTANTIVE CLAIMS WOULD HAVE SERIOUS PRACTICAL CONSEQUENCES FOR THE STATES

Skinner's severance of discovery from his substantive claim would also have significant practical consequences for the States. These consequences would be felt far beyond the death-penalty context; even states without a death penalty would be affected. If this Court recognizes a § 1983 claim for evidence outside the context of a cognizable substantive claim, Skinner can avoid the near-universal requirement of state and federal discovery rules that he establish the relevance of the requested evidence to a legally cognizable claim prior to demanding access to that evidence. The fact that States would be precluded from raising procedural bars to a prisoner's substantive claim before proceeding with discovery would dramatically increase the amount of discovery activities and would open the door to fishing expeditions for evidence that ultimately has no relevance to any cognizable claim not otherwise procedurally barred.

The burden on the States of opening their evidence lockers to any and all prisoners who request access cannot be underestimated. There are more than one million felony convictions each year in the United States. *See* William Stuntz, *Unequal Justice*, 121 Harv. L. Rev. 1969, 2028 n.276 (2008). The national organization most involved in this issue, the Innocence Project, claims that it is receiving "about 3,000 requests now a year for post-conviction DNA testing." Hearing on DNA Forensics Initiatives Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary, 110th Cong. (April 10, 2008) (testimony of Peter Neufeld, Co-Founder and Co-Director, Innocence Project). Valid restrictions in state DNA testing laws attempt to filter out non-meritorious claims from this large population. Skinner's approach would permit prisoners who did not otherwise qualify for access as a result of this filtering process to assert a right of access under § 1983 without meeting the threshold requirements often imposed by state DNA testing laws – requirements such as proof that the testing was not previously available or that testing favorable to the defendant will establish a reasonable probability of innocence. In short, it would dramatically increase the number of § 1983 claims (while simultaneously promoting circumvention of valid state postconviction DNA testing laws).

But the cost of litigating § 1983 claims is only one small part of the overall burden on the States of Skinner's approach. That burden will be more far-ranging and will include the diversion of state and local law enforcement resources for purposes of locating and transporting the evidence, assuring proper handling, processing, and packaging to prevent contamination or destruction of the evidence, and maintaining the chain of custody. These burdens are in addition to the costs of testing either by overburdened and heavily backlogged state crime labs or by private labs hired by the States to perform the requested testing. *District Attorney's Office v. Osborne*, 129 S.Ct. 2308, 2328-29 (2009) (Alito, J., concurring) (describing "costs associated with the DNA-access regime proposed by" Osborne and noting difficulties state crime labs are facing with respect to sheer volume of DNA-testing requests). *Cf.* Brief of the States of Alabama, *et al.* as *Amici Curiae* in Support of Respondent at 24-28 (discussing burdens imposed on government forensic laboratories by processing drugs seized in connection with criminal prosecutions), Brief of *Amici Curiae* National District Attorneys' Assoc., *et al.* in Support of Respondent at 11-16 (same), Brief for the United States as *Amicus Curiae* Supporting Respondent at 24 (same), *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009) (No. 07-591). These testing costs would most likely be borne in whole or in part by the States in the majority of cases – *i.e.*, in those cases in which the prisoner is indigent and cannot afford the testing costs.

And testing is rarely as simple as locating and testing a single swab of blood or semen. Skinner's case provides an excellent example of this problem. Skinner is not seeking a single test of a single piece of evidence. He is attempting to show the presence of a third party – the victim's uncle – at the scene. Pet. Br. 2-3. He has requested access to numerous pieces of evidence on which blood or semen of that third party might be found. J.A. 22. In addition, testing a single swab of blood from any blood stain may not be sufficient. Where blood or other biological material from different individuals may have commingled on an item of evidence or within a particular stain, the fact that a third party's DNA does not appear in one swab from that item or stain does not eliminate the possibility that the DNA would appear in a second swab taken from a different area of that same item or stain. Until the entire stain has been tested, the prisoner can always argue that one more swab could prove his innocence.

There is no reasoned way, moreover, to limit Skinner's approach to requests for DNA evidence, as Justice Alito correctly pointed out in his concurring opinion in *District Attorney's Office v. Osborne*. Justice Alito cited as an example a prisoner's use of § 1983 to obtain discovery in support of an as-yet-unasserted claim under *Brady v. Maryland*, 373 U.S. 83 (1963). Justice Alito took as "common ground" that a *Brady* claim – alleging that the state had failed to disclose exculpatory evidence to the defense prior to trial – must be brought as a federal habeas claim. *Osborne*, 129 S.Ct. at 2325 (Alito, J., concurring). But if the Court accepted Osborne's (and by extension Skinner's) view of § 1983, Justice Alito could "see no reason" why a prisoner could not use § 1983 to assert "a due process right to search the State's files for exculpatory evidence" based merely on speculation that the files might contain undisclosed *Brady* material. *Id.* That is, if Skinner's approach were adopted, state prisoners could use § 1983 to go on fishing expeditions to obtain discovery in support of a *potential Brady* claim. And particularly troubling to Justice Alito, the prisoners could bypass the state courts in doing so. *Id.*

Skinner addresses Justice Alito's concern only briefly in a footnote. Pet. Br. 19 n.6. Skinner distinguishes the *Brady* situation posited by Justice Alito by pointing out that a *Brady* claim, unlike an access-to-evidence claim, necessarily implies the invalidity of the prisoner's conviction. *Id.* Thus, Skinner concludes, a *Brady* claim could not be brought as a § 1983 claim. *Id.* But he misses Justice Alito's point. Justice Alito was not suggesting that a *Brady* claim could be asserted in § 1983 action; in fact, he took as a given that such claims must be brought in federal habeas. *Osborne*, 129 S.Ct. at 2325 (Alito, J., concurring). Rather, he was concerned, and correctly so, that if Osborne's interpretation of § 1983 were accepted, a prisoner could use a similar access-to-evidence claim under § 1983 to obtain discovery of the state's files, discovery obtained for the sole purpose of finding a previously unseen *Brady* claim.

The best response that Skinner can muster to the obvious drain on resources that would flow from permitting unrestricted discovery divorced from any substantive claim is that, to date, "there is no evidence that such claims have created an undue burden" on federal courts. Pet. Br. 32. Even if true, this assertion provides cold comfort for those States where innocence claims are only now becoming common practice. More important, in States with postconviction DNA testing laws, many of these claims in the past have been filtered through the state courts. Allowing a standalone claim of access, apart from any specific challenge to the state procedures, would open the door to § 1983 claims by prisoners who previously would have sought different avenues to challenge the state-court denial of access.

D. *OSBORNE* DID NOT OPEN THE DOOR TO § 1983 CLAIMS LIKE SKINNER'S

Skinner repeatedly cites this Court's discussion in *Osborne* of the importance of first invoking state postconviction DNA testing procedures before asserting a due process challenge to those procedures. Pet. Br. 6-7, 9, 29, 34-35. Skinner reads *Osborne* as leaving "the federal courthouse door open to those prisoners who possess a state-created liberty interest in proving their innocence through new evidence, but are deprived by state officials of fundamentally fair procedures necessary to vindicate that interest." Pet. Br. 29. The only threshold requirement for asserting such a claim, according to Skinner, is that the state prisoner first avail himself of those state procedures. *Id.* Skinner asserts that his claim differs materially from Osborne's claim because, while Osborne "bypassed available state avenues for obtaining DNA testing," Skinner "took advantage of every existing state court procedure for seeking access to DNA evidence." Pet. Br. 7 n.3.

Skinner reads far too much into *Osborne*'s discussion of fundamental fairness and invocation of state procedures. Osborne asserted a substantive due process right to postconviction DNA testing. This Court rejected that claim but left open the possibility that, where States provide postconviction procedures for establishing actual innocence, those procedures must meet basic procedural due process requirements. *Osborne*, 129 S.Ct. at 2320 ("Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.") (citing *Medina v. California*, 505 U.S. 437, 446, 448 (1992)). Osborne did not assert, and this Court could not find, any facial defect in Alaska's postconviction procedures, including procedures for obtaining discovery (such as new DNA testing) in support of an actual innocence claim. *Id.* at 2320. The Court acknowledged that the details of Alaska's procedures were somewhat "uncertain." *Id.* at 2321. But the fault for this uncertainty lay with Osborne who had brought his § 1983 claim without ever having invoked the state procedures. *Id.* The Court pointed out the obvious: "[I]t is Osborne's burden to demonstrate the inadequacy of the state-law procedures available to him in state postconviction relief. These procedures are adequate on their face, and without trying them, Osborne can hardly complain that they do not work in practice." *Id.* (citation omitted).

Skinner transforms this Court's simple observation about a prisoner's burden of proof into a threshold requirement for a § 1983 access-to-evidence claim. That is, according to Skinner, as long as he has invoked the procedures provided by Texas for postconviction DNA testing and been denied access, he may then file a § 1983 claim. But merely invoking state procedures unsuccessfully is not sufficient to assert a procedural due process claim; Skinner must also allege that some particular aspect of the state procedures is constitutionally inadequate. In this action, Skinner expressly disclaimed any such allegation. J.A. 31-32 & n.1 (noting that Skinner was not challenging the constitutionality of the Texas DNA law or its application by the Texas courts). In fact, even before this Court, Skinner has not identified a single provision of the Texas postconviction DNA testing law that allegedly violates federal procedural due process requirements. While invoking state procedures may be a prerequisite to asserting an as-applied ·challenge to a state law, Skinner did not assert an as-applied challenge in his complaint. Thus, his invocation of state procedures proves nothing and certainly does not open the door to a vague claim that the end result of the state procedures – the denial of access to the evidence – was itself fundamentally unfair.

In this respect, Skinner's claim varies little, if at all, from Osborne's claim. Although Skinner thinly veils his claim in the language of procedural due process – as opposed to the substantive-due-process claim asserted by Osborne – Skinner is not asserting that any particular aspect of Texas's procedures for obtaining access to DNA evidence is constitutionally flawed. Instead, he asserts that Switzer's denial of his informal request for access to the evidence, wholly independent of the Texas postconviction DNA testing law, was fundamentally unfair. J.A. 20-21, 31 n.1. Despite Skinner's use of the label "procedural due process," his claim is nothing more than *Osborne* redux.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 09-9000

Supreme Court, U.S.
FILED

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In The
Supreme Court of the United States

◆

HENRY W. SKINNER,

Petitioner,

v.

LYNN SWITZER, District Attorney
for the 31st Judicial District of Texas,

Respondent.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

◆

BRIEF OF *AMICUS CURIAE* THE NATIONAL CRIME VICTIM LAW INSTITUTE SUPPORTING RESPONDENT

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QUESTION PRESENTED

May duly-convicted prisoners like Henry Skinner use 42 U.S.C. § 1983 as a post-conviction discovery device for obtaining access to the state's biological evidence for DNA testing when doing so would make an end run around legal rights and protections for crime victims found in existing federal law?

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INTERESTS OF *AMICUS CURIAE*[1]

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational organization located at Lewis & Clark Law School, in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; promoting the National Alliance of Victims' Rights Attorneys; researching and analyzing developments in crime victim law; assisting crime victims by providing information on crime victim law; and participating as *amicus curiae* in cases involving victims' rights issues of national importance.

◆

SUMMARY OF THE ARGUMENT

After countless unsuccessful post-conviction proceedings in state and federal courts spanning fifteen years – including two separate proceedings pursuant to Texas's post-conviction DNA testing statute and a federal habeas proceeding during which he sought DNA testing – Petitioner Henry Skinner now seeks to obtain DNA testing yet again by way of a tort action under 42 U.S.C. § 1983.[2] In *District Attorney's Office for the Third Judicial District v. Osborne*, ___ U.S. ___, 129 S.Ct. 2308 (2009), this Court declined to create a freestanding constitutional right to access biological evidence for DNA testing. The Court left open, however, the issue of whether a post-conviction request for DNA testing under 42 U.S.C. § 1983 is barred by the rule set forth in *Heck v. Humphrey*, 512 U.S. 477 (1994). *See Osborne,* 129 S.Ct. at 2319. As more fully set forth below and in Respondent Lynn Switzer's brief, this Court should hold that *Heck* bars Skinner's post-conviction discovery request.

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[1] Together with this brief, *Amicus Curiae* have filed letters of consent from counsel for both Petitioner Skinner and Respondent Switzer. *Amicus Curiae* states that no counsel for a party authored any part of this brief, and no person or entity other than *Amicus Curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

In addition to the arguments set forth by Respondent Switzer, additional factors bear on the *Heck* analysis. First, allowing Skinner and other post-conviction DNA testing applicants to seek discovery of allegedly exculpatory evidence through a § 1983 action instead of a habeas proceeding would effectively allow prisoners to make an end run around vital protections for crime victims contained in the

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[2] Skinner was convicted of capital murder in 1995 and sentenced to death for the brutal 1993 murder of Twila Busby and her two sons, Elwin Caler and Randy Busby. The horrible details of the triple homicide are recounted in *Skinner v. State*, 956 S.W.2d 532 (Tex. Crim. App. 1997). These victims are survived by several family members. Surviving family members of murder victims are "victims" for purposes of asserting rights in relevant proceedings. *See* 18 U.S.C. § 3771(e); *see also* Tex. Code Crim. Proc. Ann. art. 56.02(a). This brief will use the phrase "crime victim" as including both the murder victim and the victim's surviving family members.

Crime Victims' Rights Act (CVRA or Act), 18 U.S.C. § 3771. Among other rights, the CVRA guarantees crime victims the right to be present and heard in federal habeas proceedings. 18 U.S.C. § 3771(b)(2)(A). The Act also grants victims the right to "proceedings free from unreasonable delay." 18 U.S.C. § 3771(a)(7). The CVRA further promises victims the right to "be treated with fairness and with respect for [their] dignity and privacy." 18 U.S.C. § 3771(b)(2)(A).

Second, a crime victim's legitimate interest in finality in a case such as this – where the state prisoner has had ample opportunity to challenge his conviction during fifteen years of traditional post-conviction litigation in state *and* federal courts – outweighs Skinner's illegitimate interest in evading the appropriate avenue for review, which is a habeas petition.

Amicus is not arguing that Skinner should be denied any opportunity to seek testing. *Amicus*' more limited point is that a prisoner's request for post-conviction DNA testing for the purpose of finding exculpatory evidence "falls within 'the core' of habeas" and therefore should proceed only by way of a habeas petition, thus ensuring that crime victims' rights will be respected and considered. *Osborne*, 129 S.Ct. at 2326 (Alito, J., concurring) (quoting *Preiser v. Rodriguez,* 411 U.S. 475, 489 (1973)).

If this Court nonetheless recognizes the viability of a § 1983 claim for post-conviction DNA testing, it should be guided by some of the requirements set forth in the carefully crafted federal post-conviction DNA testing statute, 18 U.S.C. § 3600. In particular, the Court should require that any such claim be predicated on an actually innocent applicant seeking access to previously-unavailable evidence. The applicant should also be required to demonstrate good cause for not having obtained testing before trial. Further, the Court should hold that any testing must be conducted in a fashion that takes the victim's rights, interests, and concerns into account.

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ARGUMENT

I. SKINNER SHOULD BE REQUIRED TO PROCEED BY WAY OF A FEDERAL HABEAS CORPUS PETITION SO THAT CRIME VICTIMS' STATUTORY RIGHTS ARE RESPECTED.

A crime victim has significant interests at stake when a prisoner seeks post-conviction DNA testing for the purpose of discovering exculpatory evidence. First, the proceeding obviously may have an impact on the validity of the underlying conviction. Therefore, a crime victim has legitimate interests in receiving notice of and taking part in the proceedings. Second, the crime victim may have significant privacy interests in the biological evidence at issue.[3] While a

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[3] For example, a rape victim has a significant interest in the DNA analysis of the rape-scene evidence, as the analysis

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crime victim's legitimate interests do not, in and of themselves, necessarily trump the interest of a prisoner such as Skinner in having the biological evidence tested, the crime victim's rights and concerns should be weighed when considering the competing interests at stake. The Court should not permit a procedure that would allow Skinner and other post-conviction DNA testing applicants to circumvent the protections that crime victims are entitled to in the federal criminal justice system.

A. The Crime Victims' Rights Act Protects Victims' Rights In Federal Habeas Corpus Proceedings.

Passed by Congress in 2004, the Crime Victims' Right Act is a far-reaching federal statute that protects victims' rights in the federal criminal justice system. *See generally* Jon Kyl, Steven J. Twist & Stephen Higgins, *On the Wings of Angels: the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L. Rev. 581 (2005). The CVRA is intended to address the "dramatic disparity between the rights of defendants in our constitution and laws, and the rights of crime victims and their families"

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may reveal intimate details about the previous sexual partners of the victim. Moreover, the evidence may include not only biological material from the rapist but also from the victim; analysis of the victim's blood and genetic material can seriously intrude on the victim's privacy.

because "our criminal justice system can and should care about both the rights of accused and the rights of victims." 150 Cong. Rec. S4262 (Apr. 22, 2004) (statement of Sen. Feinstein). Congress enacted the CVRA because "[i]n case after case [it] found victims . . . were ignored, cast aside, and treated as non-participants in a critical event in their lives." *Id.*

Enacted with near universal congressional support, the CVRA is a "broad and encompassing" statutory victims' bill of rights. 150 Cong. Rec. S4261 (Apr. 22, 2004) (statement of Sen. Feinstein). To make victims participants in the criminal process, the Act specifically grants to victims rights to notice of all public court proceeding, to attend any such proceedings, and to be heard at proceedings involving release, plea, sentencing, and parole. 18 U.S.C. § 3771(a)(2)-(4). The Act also grants victims the right to "proceedings free from unreasonable delay." 18 U.S.C. § 3771(a)(7). The Act further promises that victims will be treated "with fairness and with respect for [their] dignity and privacy." 18 U.S.C. § 3771(a)(8).

In its original form, the Act protected only victims of federal offenses during federal criminal proceedings. *See* 18 U.S.C. § 3771(b)(1), (e). In 2006, Congress extended crime victims' rights to victims during federal habeas corpus proceedings that arise out of state convictions. *See* 18 U.S.C. § 3771(b)(2)(A). This extension granted the victims of state crimes rights that federal courts must respect while resolving habeas petitions – including the rights to be present and heard at proceedings, to proceedings free from unreasonable delay, and to be treated with fairness and with respect for the victim's dignity and privacy. *Id.*[4]

B. Skinner and Other Post-Conviction Testing Applicants Should Not Be Permitted to Circumvent the Crime Victims' Rights Act's Protections for Crime Victims By Avoiding the Federal Habeas Corpus Process Through Artful Pleading.

This Court has repeatedly stated that the habeas corpus statute "is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement." *Preiser v. Rodriguez*, 411 U.S. at 490; *accord Heck v. Humphrey*, 512 U.S. at 481. This is true whether the state prisoner seeks injunctive relief or monetary damages. *Heck,* 512 U.S. at

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[4] Indeed, it bears emphasizing that a habeas application in this case would have triggered a judicial obligation under the CVRA to respect the crime victims' interests without any court appearance by the victims. A federal court considering a habeas petition from a prisoner is obligated to "ensure" that the crime victims are "afforded" their rights. 18 U.S.C. § 3771(b)(2)(A). This fact is important because crime victims often lack the funds to obtain legal counsel to protect their interests during prisoners' extended legal maneuvering in state and federal courts at trial court and appellate levels. Typically, crime victims (like criminal defendants) are disproportionately poor. *See* U.S. Dept. of Justice, Bureau of Justice Statistics, *Criminal Victimization in the United States* tbl.14 (2006) (finding higher victimization rates at lower income levels).

483-88. Although Skinner has artfully re-characterized his claims so that they neither actually assert his innocence nor directly attack the validity of his conviction, the only purpose for seeking post-conviction DNA testing is to find exculpatory evidence. *See* J.A. 20-21 (prayer for relief alleges that Respondent Switzer violated Skinner's constitutional rights "[b]y refusing to release the biological evidence for testing, and thereby preventing [Skinner] from gaining access to exculpatory evidence that could demonstrate he is not guilty of capital murder"). A claim for "discovery of evidence that has a material bearing on his conviction. . . . falls within 'the core' of habeas." *Osborne,* 129 S.Ct. at 2325 (Alito, J., concurring). Such claims implicate crime victims' rights under the CVRA.

In contrast, proper objects of a § 1983 action that are unrelated to the guilt/innocence of a convicted prisoner do not trigger CVRA interests. For example, if a prisoner were to bring a § 1983 action after being assaulted by a prison guard, *see, e.g., Wilkins v. Gaddy,* ___ U.S. ___, 130 S.Ct. 1175 (2010), the crime victim of the prisoner's underlying criminal conduct would lack a legal right to be notified, present, or heard at proceedings in that action.

No matter how Skinner labels his discovery request, there can be no doubt that a prisoner's post-conviction proceeding to obtain discovery of allegedly exculpatory DNA evidence is a "critical event" in crime victims' lives. 150 Cong. Rec. S4262 (Apr. 22, 2004) (statement of Sen. Feinstein). When considering whether *Heck* bars Skinner's § 1983 claim, the Court should be mindful of Congress' intent to bring crime victims into the folds of the criminal justice system and consider the crime victims' legitimate interests in post-conviction discovery proceedings that may have a bearing on the validity of the prisoner's conviction.

As stated above, Congress intended for the CVRA to provide broad and encompassing rights to crime victims. "It would wholly frustrate explicit congressional intent to hold that the [petitioner] in the present case could" circumvent the important protections in place for crime victims "by the simple expedient of putting a [§ 1983] label" on his request. *Preiser*, 411 U.S. at 489-90. Allowing Skinner and other post-conviction DNA testing applicants to raise their discovery requests through a civil tort action rather than a federal habeas petition would leave the crime victims without any statutory rights in the process. This approach runs contrary to the command of Congress in passing the CVRA that crime victims' rights be respected throughout the criminal justice process.

II. IN A CASE SUCH AS THIS WHERE THE PRISONER HAS HAD AMPLE OPPORTUNITY TO CHALLENGE HIS CONVICTION AND SEEK THE REQUESTED DNA TESTING THROUGH EXISTING STATE AND FEDERAL AVENUES, THE CRIME VICTIMS' INTEREST IN FINALITY OUTWEIGHS THE PRISONER'S INTEREST IN SECURING YET ANOTHER AVENUE TO OBTAIN POST-CONVICTION DISCOVERY.

The Court has recognized that "[f]inality is essential to both the retributive and the deterrent functions of criminal law." *Calderon v. Thompson*, 523 U.S. 538, 555 (1998) (discussing principles that guide the Court in habeas corpus jurisprudence). "'Without finality, the criminal law is deprived of much of its deterrent effect.'" *Id.* (quoting *Teague v. Lane,* 489 U.S. 288, 309 (1989)). Furthermore, "[o]nly with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and victims of crime alike." *Id.* at 556 (quoting *Herrera v. Collins*, 506 U.S. 390, 421 (1993)) (internal citations and quotations omitted).

This case illustrates what could happen if the Court were to allow Skinner and other applicants for post-conviction DNA testing to obtain discovery under § 1983. First, as discussed more fully by Respondent Switzer, Skinner would be able to mount a post-conviction evidentiary attack on his state court conviction "without any of the restrictions the Court and Congress have imposed on such attempts." Resp't Br. 41.

Second, crime victims would face even more years of uncertainty than they do now. Here, Skinner has filed multiple state and federal habeas petitions as well as three separate post-conviction motions for DNA testing since his 1995 conviction. *See* Resp't Br. 9-13. Two of his earlier DNA testing requests were filed under Texas's post-conviction DNA statute, article 64 of the Texas Code of Criminal Procedure[5]

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[5] Texas's post-conviction DNA statute is arguably less stringent than the federal counterpart, 18 U.S.C. § 3600. Section 3600 requires, *inter alia,* that the applicant "assert[ ], under penalty of perjury, that the applicant is actually innocent of" the relevant offense at issue. 18 U.S.C. § 3600(a)(1). Article 64 of the Texas Code of Criminal Procedure does not have a similar requirement. *See* Tex. Code Crim. Proc. Ann. art. 64.01-.03; *see also Smith v. State*, 165 S.W.3d 361, 364 (Tex. Crim. App. 2005) (observing legislative history indicates "the Legislature did not intend for the defendant to have to prove actual innocence (a principle under habeas law) in order to meet his burden to have the test done") (internal quotations omitted). As of July 2010, 47 states and the District of Columbia have joined Texas in enacting post-conviction DNA testing statutes. *See* Ala. Code § 15-20-200; Alaska Stat. §§ 12.72.010, 12.73.010 -.090 (effective July 1, 2010); Ariz. Rev. Stat. Ann. § 13-4240; Ark. Code Ann. §§ 16-112-202 to -208; Cal. Penal Code § 1405; Colo. Rev. Stat. §§ 18-1-411 to -416; Conn. Gen. Stat. § 54-102kk; Del. Code. Ann. tit. 11, § 4504; D.C. Code Ann. § 22-4133; Fla. Stat. Ann. §§ 925.11 to 925.12, 943.3251; Ga. Code Ann. § 5-5-41(c); Haw. Rev. Stat. Ann. §§ 844D-121 to -133; Idaho Code Ann. § 19-4902(b)-(f); 725 Ill. Comp. Stat. Ann. 5/116-3; Ind. Code Ann.

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and one motion was filed in connection with his federal habeas petition. Rather than seek this Court's review of the Court of Criminal Appeals' decisions by certiorari, Skinner filed this § 1983 action.

Generally, when lengthy post-conviction habeas proceedings have run their course, the crime victim may expect the matter to have reached an end. However, if the Court were to allow post-conviction DNA testing requests to proceed under § 1983, the Court would effectively extend the already lengthy post-conviction challenge period by an untold number of years. Moreover, given the different legal standards that apply in § 1983 actions and habeas proceedings,[6]

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§§ 35-38-7-1 to -19; Iowa Code § 81.10; Kan. Stat. Ann. § 21-2512; Ky. Rev. Stat. Ann. § 422.285; La. Code Crim. Proc. Ann. art. 926.1; Me. Rev. Stat. Ann. tit. 15, §§ 2137-2138; Md. Code Ann. Crim. Proc. § 8-201; Mich. Comp. Laws Serv. § 770.16; Minn. Stat. § 590.01(1a); Miss. Code Ann. §§ 99-39-5 to -11; Mo. Rev. Stat. §§ 547.035-.037; Mont. Code Ann. § 46-21-110; Neb. Rev. Stat. Ann. §§ 29-4116 to -4125; Nev. Rev. Stat. Ann. § 176.0918; N.H. Rev. Stat. Ann. § 651-D:2; N.J. Stat. Ann. § 2A:84A-32a; N.M. Stat. Ann. § 31-1A-2; N.Y. Crim. Proc. Law § 440.30(1-a); N.C. Gen. Stat. §§ 15A-269 to -270.1; N.D. Cent. Code § 29-32.1-15; Ohio Rev. Code Ann. §§ 2953.71-2953.82; Or. Rev. Stat. §§ 138.690 to .696; 42 Pa. Cons. Stat. Ann. § 9543.1; R.I. Gen. Laws § 10-9.1-12; 2008 S.C. Code Ann. §§ 17-28-10 to -120; S.D. Codified Laws § 23-5B-1; Tenn. Code Ann. §§ 40-30-301 to -313; Utah Code Ann. §§ 78B-9-301 to -304; Vt. Stat. Ann. tit. 13, §§ 5561-5570; Va. Code Ann. § 19.2-327.1; Wash. Rev. Code Ann. § 10.73.170; W. Va. Code Ann. § 15-2B-14; Wis. Stat. § 974.07; Wyo. Stat. Ann. §§ 7-12-303 to -315.

[6] For example, this Court and Congress have imposed sharp limits to discovery in federal habeas proceedings. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 420, 436 (2000); *Wainwright v.*

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the crime victims could be subject to additional uncertainty caused by the possible re-litigation of evidentiary disputes that should have been resolved at trial and through the direct appeal process.

Here, Skinner has already unsuccessfully sought DNA testing of the items at issue pursuant to the state post-conviction DNA statute.[7] Bypassing the direct appeal process, Skinner now seeks to proceed in a civil tort action in federal court (where the victim would not have any clear statutory rights) that could set the stage for an untold number of additional proceedings. Indeed, Skinner's brief admits that he may drag out the proceedings indefinitely without ever needing to state that he is actually innocent of the crime. *See, e.g.*, Pet. 29 (acknowledging, at best, that this is a "case brought by a *possibly innocent* man") (emphasis added); Pet'r Br. 18 ("While Mr.

Sykes, 433 U.S. 72, 87-90 (1977); 28 U.S.C. § 2254(e)(2). Generally far more liberal civil discovery rules apply in § 1983 actions.

[7] During trial, Skinner's counsel made a deliberate decision not to test certain biological evidence for strategic purposes. *See Skinner v. Quarterman*, No. 2:99-CV-0045, 2007 WL 582808, *31-32 (N.D. Tex. 2007) (rejecting Skinner's ineffective assistance of counsel claim and finding that the record "reflects . . . that trial counsel thoroughly considered [the DNA testing] issue and made the conscious decision not to have any additional nuclear DNA testing performed" and "this decision was an informed one based on trial tactics and sound strategy"). Yet he was still afforded the opportunity to seek DNA testing under Texas' post-conviction DNA statute, and he did so twice. *See* Resp't Br. 10-12; *Skinner v. State*, 293 S.W.3d 196, 199 (Tex. Crim. App. 2009) (discussing procedural history).

Skinner may, at some future date, use the results of DNA testing of this evidence to initiate a separate proceeding"); Pet'r Br. 18 n.5 (discussing other possible applications).

Criminal justice involves weighing the interests of defendant, state, crime victim, and society. Where, as here, a state prisoner has been afforded all the traditional avenues of challenging his conviction and seeking post-conviction DNA testing, the crime victims' interest in finality outweighs the prisoner's interest in securing yet another avenue for mounting his evidentiary challenge to the underlying conviction.

The crime victims' interest in finality is particularly compelling where the post-conviction DNA applicant like Skinner has failed to demonstrate that there is a need for federal courts to create a § 1983 action for purposes of post-conviction discovery and doing so would remove all of the protections due crime victims under the CVRA. "Since 1874, the habeas corpus statute has directed the courts to determine the facts and dispose of the case summarily, 'as law and justice require.'" *Preiser,* 411 U.S. at 487; *see* 28 U.S.C. § 2243. The habeas statute provides Skinner, and similarly situated prisoners, all necessary protection against injustice, while at the same time creating a process that protects the rights of crime victims. Skinner should not be allowed to skirt this process.

III. EVEN IF THIS COURT WERE TO RECOGNIZE A SECTION 1983 CLAIM FOR POST-CONVICTION ACCESS TO DNA EVIDENCE, THE CLAIM SHOULD BE NARROWLY DEFINED TO PROTECT CRIME VICTIMS' LEGITIMATE INTERESTS IN PRIVACY AND FINALITY.

Assuming *arguendo*, that this Court were to decide that post-conviction access to evidence for DNA testing is cognizable under § 1983, the Court should be guided by 18 U.S.C. § 3600, the federal post-conviction DNA testing statute, and require an applicant (like Skinner) to make several showings before securing access to the evidence. First, the applicant should be required to show that he or she is attempting to prove "actual innocence." Second, the applicant should be required to demonstrate that the evidence was indeed "previously unavailable." Third, the applicant should be required to show that the evidence will help "establish" actual innocence – a materiality requirement.[8] Construing § 1983 as requiring an applicant for post-conviction DNA testing to prove these points to establish a state actor has subjected him or her to "the deprivation of . . . rights, privileges, or immunities secured by the Constitution," 42 U.S.C. § 1983, would be a step in the direction of securing a fairer process for crime victims.

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[8] This brief does not discuss the "materiality" requirement under the facts of this case, leaving such discussion to the parties.

A. The Applicant Should Be Required to File a Sworn Affidavit, Under Penalty of Perjury, That He Is Actually Innocent of the Crime.

Skinner's § 1983 complaint claims, *inter alia*, that his due process rights have been violated because he has been prevented "from gaining access to *exculpatory* evidence that could demonstrate he is not guilty of capital murder." J.A. 20-21 (Skinner's First Claim for Relief) (emphasis added). Skinner's innocence should therefore be a prerequisite to any constitutional deprivation by the state. Yet at no time during the previous post-conviction DNA testing proceedings has Skinner sworn that he is actually innocent of the crime.[9] Similarly, neither his complaint nor any of the supporting briefs in this proceeding clearly states, without qualifications, that he is actually innocent.[10]

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[9] Texas's post-conviction DNA statute does not require a claim of actual innocence, and it is more generous in this regard than its counterpart in federal law as well as a number of sister states. *Compare* Tex. Code Crim. Proc. Ann. art. 64.01-.03 *with* 18 U.S.C. § 3600(a)(1), Alaska Stat. § 12.73.010(b)(1), Fla. Stat. Ann. § 925.11(2)(a), Mont. Code Ann. § 46-21-110(1), N.C. Gen. Stat. § 15A-269(b)(3), Or. Rev. Stat. § 138.692(1)(a)(A)(i), 42 Pa. Stat. Ann. § 9543.1(c)(2), S.D. Codified Laws § 23.5B-1(1), Utah Code Ann. § 78B-9-301(2), Vt. Stat. Ann. tit. 13, § 5561(a)(2), *and* Wis. Stat. § 974.07(7)(a)(1).

[10] At one point, the Petition for Writ of Certiorari claims that "Mr. Skinner has always maintained that he is innocent of the crimes of which he was convicted." Pet. 7. But the procedural history does not support that contention, as Respondent

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The Court should require that Skinner submit a sworn affidavit, under penalty of perjury, that he is indeed innocent before he is allowed to proceed on the merits. This requirement is vitally important to crime victims, as it can help deter fraudulent and frivolous claims for DNA testing by guilty prisoners. Fraudulent claims impose psychological trauma on victims and their families. The interest in deterring fraudulent and frivolous claims is recognized by 18 U.S.C. § 3600(a)(1) and the many state statutes that have made a sworn statement of actual innocence a prerequisite to moving forward with a post-conviction application for DNA testing. *See supra* note 9; *see also* 150 Cong. Rec. S10676 (Oct. 7, 2004) (statement of Sen. Leahy) (the reason for this requirement was to provide a "check[ ] against frivolous litigation"); 150 Cong. Rec. S11609 (Nov. 19, 2004) (statement of Sen. Grassley) (such a requirement is meant to deter "false claims" or attempts to "'game the system'"). Without such a check, guilty prisoners might use post-conviction requests for DNA testing to "muddy the waters" and "fuel a new and frivolous series of appeals." 149 Cong. Rec. S12294 (Oct. 1, 2003)

Switzer's brief persuasively establishes. And tellingly, Skinner's counsel has been careful to not actually assert in either the § 1983 complaint or moving papers that Skinner is actually innocent of the crimes, presumably because proclaiming his actual innocence would undermine Skinner's position that he is not really challenging the validity of his conviction (therefore making his claim one that must be brought via a habeas proceeding).

(statement of Sen. Hatch). It is hard to believe that Congress would have intended these detailed anti-fraud provisions in § 3600 to be easily circumvented by prisoners through the simple expedient of filing claims under § 1983.

B. The Applicant Should Be Required to Show Good Cause for Not Having Conducted Testing Before Conviction.

This Court has instructed that "[t]here is no general constitutional right to discovery in a criminal case," *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977), much less a general constitutional right to discovery after conviction. And any obligation to produce exculpatory evidence is limited to situations "involv[ing] the discovery, after trial, of information which had been known to the prosecution but *unknown* to the defense." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added).

In light of these principles, an applicant should not be able to obtain post-conviction testing of biological evidence unless he demonstrates good cause for failing to obtain pre-conviction testing. *Cf. Williams v. Taylor*, 529 U.S. at 432-33 (holding that 28 U.S.C. § 2254(e)(2) codifies the "cause-and-prejudice" standard set forth in *Kenney v. Tamayo-Reyes*, 504 U.S. 1, 112 (1992), which requires state prisoners to meet a threshold standard of diligence in developing the material facts in the state-court record). Any other approach would unfairly harm crime victims. A criminal could bet on an acquittal at trial without DNA testing (and avoid discovering incriminating evidence); then, if convicted, the criminal could take a second shot at acquittal by seeking DNA testing – all the while extending the anxiety that the crime victim and her family will understandably feel while the prisoner's original conviction and sentence remains subject to being potentially overturned. Such a result would encourage "'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Wainwright v. Sykes*, 433 U.S. at 89. For this reason, the federal post-conviction DNA testing statute and a number of other similar state statutes, including Texas, have imposed a requirement that the applicant show good cause for failing to secure previous testing.[11] If the Court were to allow Skinner to proceed under § 1983, this Court should similarly require

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[11] *See* 18 U.S.C. § 3600(a)(3)(A); Ala. Code 1975 § 15-18-200(e)(2); Ark. Code Ann. § 16-112-201(a); Colo. Rev. Stat. § 18-1-413(1); Del. Code. Ann. tit. 11, § 4504(a)(2); Ga. Code Ann. § 5-5-41(c)(3)(a); Idaho Code Ann. § 19-4902(b); Minn. Stat. § 590.01(1a)(2); Mo. Rev. Stat. § 547.035(2); Nev. Rev. Stat. Ann. § 176.0918; N.D. Cent. Code Ann. § 29-32.1-15(1)(b); 42 Pa. Stat. Ann. § 9543.1(a)(2); S.D. Codified Laws § 23-5B-1(5)-(6); Tex. Code Crim. Proc. Ann. art. 64.01(b)(1)-(2); Utah Code Ann. § 78B-9-301(4); Va. Code Ann. § 19.2-327.1(A); Wash. Rev. Code Ann. § 10.73.170(2)(a); W. Va. Code Ann. § 15-2B-14(f)(8); Wyo. Stat. Ann. § 7-12-303(c)(viii).

Skinner to establish good cause for failure to obtain DNA testing before trial.[12] Because the record shows Skinner cannot satisfy this requirement, the Court should deny Skinner's petition for relief even if his claim were allowed to proceed under § 1983.[13]

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[12] This showing may be satisfied in a number of ways, including a showing that DNA testing was not previously available. *See* statutes cited *supra* note 11.

[13] In this case, Skinner previously moved for DNA testing under Texas's post-conviction DNA testing statute. Under Texas Code of Criminal Procedure Article 64.01(b)(1)(B), if, as here, previous DNA testing were available or technologically capable of providing probative results, the applicant must establish that the evidence was not previously subjected to DNA testing "through no fault of the convicted person, for reasons that are of a nature that the interests of justice require DNA testing." Tex. Code Crim. Proc. Ann. art. 64.01(b)(1)(B).

In affirming the lower court's denial of Skinner's second state court post-conviction DNA testing motion, the Texas Court of Criminal Appeals held that Skinner failed to meet statute's "no fault" requirement. *Skinner v. State,* 293 S.W.3d at 202. The court concluded that the "no fault" requirement cannot be satisfied where trial counsel's failure to request DNA testing of the items at issue was part of a deliberate and reasonable trial strategy. *Id.* at 202-03, 209. "To hold otherwise would allow defendants to 'lie behind the log' by failing to seek testing because of a reasonable fear that the results would be incriminating at trial but then seeking testing after conviction when there is no longer anything to lose." *Id.* at 203.

C. The Crime Victims Should Be Treated Fairly and With Respect for Their Dignity and Privacy and Should Be Heard With Regard to Any Testing.

The Court should direct lower courts to take into consideration the crime victims' legitimate interests in being heard and treated fairly and with respect for their dignity and privacy when determining the scope of any DNA testing. There can be little doubt that Congress would want victims' interests considered in construing the broad language of § 1983. In passing the Innocence Protection Act of 2004, Congress explicitly directed that any testing must be "reasonable in scope." 18 U.S.C. § 3600(a)(5). More generally, as explained above, Congress has commanded that crime victims have "the right to be treated with fairness and with respect for [their] dignity and privacy," 18 U.S.C. § 3771(a)(8), and has extended these rights to both federal criminal and habeas proceedings, 18 U.S.C. § 3771(b)(1)-(2).

In construing § 1983 in other contexts, the Court has not hesitated to read into the general language qualifications to ensure that congressional concerns are not frustrated. For instance, in *Pierson v. Ray*, 386 U.S. 547, 555 (1967), this Court read § 1983 as containing a doctrine of judicial immunity in light of presumed congressional intentions. Similarly, in *Preiser v. Rodriguez,* 411 U.S. 475, this Court limited the application of § 1983, precluding its use by prisoners in lieu of federal habeas proceedings. To do otherwise, this Court explained, "would wholly frustrate explicit congressional intent." *Id.* at 489. The Court has also read procedural requirements into the statute. *See, e.g.*, *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (creating more relaxed procedural requirements for *pro se* § 1983 suits).

In the same fashion, this Court should construe any right for prisoners to use § 1983 to obtain post-conviction access to DNA testing as being implicitly bound by the requirement that the testing be "reasonable in scope" – the same requirement found in the current federal post-conviction DNA testing statute, 18 U.S.C. § 3600(a)(5). Testing is obviously not reasonable in scope if it is conducted without regard for the victims' interests. Therefore, the Court should instruct lower courts to conduct such inquiry when ordering DNA testing under § 1983.[14]

Moreover, in the limited areas of post-conviction DNA testing under § 1983, the Court should consider the § 1983 action as an extension of the underlying criminal proceeding and, as such, recognize that crime victims should have the right to be present and heard during the proceedings without any formal intervention motion. *Cf.* 18 U.S.C. § 3771(a)(2)-(4) (crime victims have the right to be present and be reasonably heard at "any public court proceeding" "involving the crime"). In particular, lower courts should request that prosecutors relay any concerns that crime victims might have about the scope of testing. Lower courts should also use their statutory and discretionary power to appoint counsel for crime victims when victims' issues appear to be at stake. *See generally* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. Rev. 835, 912-16 (2005) (reviewing judicial power to appoint counsel for crime victims); John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 McGeorge L. Rev. 689, 693-95 (2002).

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[14] What limits, if any, should be placed on any testing is a fact specific inquiry and would vary from case to case.

In cases such as this, fairness will only be achieved by hearing from crime victims and crafting testing procedures that protect their interests. As this Court has repeatedly noted, "'Justice, though due to the accused, is due to the accuser also. . . . We are to keep the balance true.'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.)). Accordingly, if the Court were to permit post-conviction DNA testing claims to proceed under § 1983, the Court should direct lower courts to consider crime victims' interests and concerns in the proposed testing procedures.

◆

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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Date: September 16, 2010

AMICUS
CURIAE
BRIEF

No. 09-9000

IN THE

Supreme Court of the United States

HENRY W. SKINNER,
Petitioner,
v.
LYNN SWITZER,
DISTRICT ATTORNEY FOR THE
31ST JUDICIAL DISTRICT OF TEXAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION SUPPORTING RESPONDENT

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IN THE

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HENRY W. SKINNER,

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION SUPPORTING RESPONDENT

INTEREST OF *AMICUS CURIAE*

The National District Attorneys Association (NDAA) is the world's oldest and largest professional organization representing prosecutors.[1] Its members—found in the offices of district attorneys, state's attorneys, attorneys general, and county and city prosecutors—prosecute criminal violations in every State and territory of the United States. Its potential membership at any given moment is coterminous with the class of potential defendants that this case would authorize if this Court accepts petitioner's view of the law.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* National District Attorneys Association certifies that this brief was not authored in whole or in part by counsel for any party and that no

Founded in 1950, the NDAA has sought to provide local prosecutors with a national perspective on issues that appear and recur in their offices nationwide. The NDAA also advocates at the national level regarding those issues. The NDAA's underlying objective, like that of its individual members, is to see that justice is done under the rule of law. To that end, the NDAA seeks to advance the criminal justice system by supporting efforts designed to preserve the honor and integrity of America's state and local prosecuting attorneys, improve and facilitate the administration of justice, and promote the study of law and the diffusion of knowledge of the law through the continuing education of prosecuting attorneys, lawyers, law-enforcement personnel, and other members of the interested public. It is vitally interested in enabling prosecutors to perform their duties to their utmost by most effectively using the limited resources entrusted to them. It therefore urges legislatures to adopt clear and practicable statutes in defining the duties and responsibilities of prosecutors, and courts to make clear and practicable interpretations in construing and applying statutory or constitutional texts.

The interests of the NDAA and its members are di-

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person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), the parties' letters so consenting have been filed with the Clerk.

rectly implicated by this case. Given that actions under 42 U.S.C. § 1983 are limited to claims against state and local governmental actors, the membership of the NDAA will be directly affected if this Court determines that actions under § 1983, rather than only under the statutes authorizing applications for writs of habeas corpus, are an appropriate federal-court vehicle for seeking postconviction access to state-court evidence.

SUMMARY OF ARGUMENT

This case is not about DNA, due process, or actual innocence. It is about whether to expand federal jurisdiction.[2] The NDAA seeks the pronouncement of a clear rule that is faithful to this Court's precedents and avoids any unintended consequences that could needlessly impair the smooth functioning of the States' criminal-justice systems. Because the respondent's view of the law advances these interests, the NDAA respectfully urges the Court to affirm the judgment below.

1. Whether habeas corpus or § 1983 is the proper vehicle to pursue a claim for postconviction discovery—in this case, access to DNA evidence, but in the next case perhaps something completely different—is a question about the contours of federal jurisdiction. The Court has labored for decades to demarcate the boundaries between these two "fertile sources of federal-court prisoner litigation," *Heck* v. *Humphrey*, 512 U.S. 477, 480 (1994). All sides agree that habeas corpus is the exclusive vehicle to directly challenge a conviction or sentence; all agree that claims with only a tenuous connection to such a chal-

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[2] As described below, the expansion of federal jurisdiction refers not to a new subject opened to the federal courts; sitting in habeas, they already can review alleged federal deprivations in state-court criminal proceedings, including those involving discovery. The expansion would arise from removing the appropriate limits on the use of 42 U.S.C. § 1983 as a vehicle for such federal review.

lenge may be brought under § 1983. The parties' dispute boils down to a question of granularity. May a challenge to a conviction or sentence, if chopped up into bite-size litigation nuggets—no single one of which would immediately imply the invalidation of a conviction—be brought under § 1983? If the Court's view is, in fact, that the habeas statutes can be disregarded so long as a § 1983 plaintiff is careful to request relief just shy of actual release or invalidation of a conviction, then this case offers a clear opportunity to expand § 1983 accordingly.

But this Court's cases compel no such result. Indeed, from *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-490 (1973), onward, this Court has sought to deter "eva[sion]" of habeas corpus requirements via "the simple expedient of putting a different label on" a complaint. Petitioner's position, by contrast, would provide a judicially-drawn roadmap for bypassing the exclusivity of habeas corpus when a convict's postconviction claim turns on the very building blocks of a state-court criminal trial, such as the evidence that demonstrates guilt or innocence. The same finality and comity interests that motivated the Court in *Preiser* and its progeny also disfavor the use of piecemeal § 1983 litigation in the place of habeas corpus for federal courts to pass upon claims of postconviction access to evidence. Habeas corpus proceedings are the means for prosecutors, as agents of the State, to defend the conduct of litigation. That process would be undermined by erecting § 1983 suits as an alternative (or additional) pathway to relief and delay. The Court should therefore make clear the simple rule that, when no conviction remains intact, suing a state or local prosecutor for relief connected to any aspect of state-court criminal proceedings is cognizable only under the habeas statutes, regardless of how deftly a complaint is drafted.

2. Whether alleging sins of omission or commission, challenges to any portion of the conviction should remain

within the parameters of habeas corpus. This principle is consistent not only with this Court's cases but with the practicalities of how state and local prosecutors participate in the administration of justice across the Nation. The alternative—a vast expansion of § 1983 as a new form of collateral litigation—would severely disrupt the functioning of state and local prosecutors' offices. Even if somehow limited to cases involving DNA—and there can be little doubt that prisoners will use a newly strengthened § 1983 in creative ways—these new suits could be staggering in number and in new expense.

These new claims are emerging at a time of nationwide economic hardship, which has extended to prosecutors' offices. Budgets are tight even *without* new exposure under § 1983; some prosecutors have even publicly acknowledged that their triage measures have left them unable to prosecute entire categories of crimes. In this context, when it becomes a choice between prosecuting crimes or defending the state policies that limit access to evidence in appropriate cases, as described by this Court in *District Attorney's Office for the Third Judicial District* v. *Osborne*, 129 S. Ct. 2308 (2009), the temptation to capitulate as to the latter may grow along with the costs of defending oneself against civil-rights charges (whether paid individually or through a state-funded budget). Such a "reduction" in litigation might appear salutary. But if it comes at the cost of the balanced legislative policies that require providing postconviction DNA evidence in appropriate cases and refusing it in inappropriate ones, the expansion of § 1983 in this case may seriously undermine the very legislative balancing that this Court embraced in *Osborne*. By maintaining habeas corpus as the vehicle for federal review, the Court will make it more likely that decisions are based on legislative will than on risk-management or budgetary considerations.

ARGUMENT

This case will decide whether state and local prosecutors will continue to respond to challenges to state-court convictions—including demands for postconviction discovery—through the habeas corpus statutes, or whether they will be identified as civil-rights defendants in actions brought under § 1983. This Court's cases militate in favor of a clear holding that, when seeking postconviction access to evidence of guilt established in state-court criminal proceedings, no amount of careful drafting is sufficient to convert an action that *should* be brought in habeas into one that *can* be brought under § 1983. This reading of precedent is undergirded by the deleterious practical effects of a contrary ruling.

I. POSTCONVICTION ACCESS TO EVIDENCE—DNA OR OTHERWISE—SHOULD BE BROUGHT UNDER HABEAS CORPUS RATHER THAN § 1983

For prisoners whose conviction or sentence remains intact, § 1983 should not become a vehicle for "preliminary habeas" actions, whether by seeking postconviction discovery of evidence or any other relief inescapably associated with the central questions of guilt or punishment. In cases like this one, where the convict seeks evidence *precisely to show innocence*, this Court's cases do not support transforming what should be an application for a writ of habeas corpus into an action under § 1983.

A. The question presented amounts to whether a habeas petition is the sum of a collection of § 1983 actions

Drawing the line between cases that must be brought pursuant to the habeas corpus statutes and those that may be brought under § 1983 is a difficult enterprise. Little discussion is required concerning the basic principles, on which the parties agree—first, that § 1983 is closed to a purported plaintiff when "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence," *Heck*, 512 U.S. at 487, and second, that § 1983 is open to a plaintiff when the "connection" between the particular challenge and the invalidation of a conviction or a speedier release "is too tenuous" to fit within the first rule, *Wilkinson* v. *Dotson*, 544 U.S. 74, 78 (2005). See Brief for Petitioner 11-12; Brief for Respondent 19-21 (describing the general framework). But the parties' understanding of the case law diverges when they move beyond these basic rules.

The real dispute between them concerns the level of granularity with which courts may review a complaint, and can be summed up by their different answers to this question: If a claim can only be brought under habeas, may it be chopped up into multiple litigation segments, each recharacterized as a stand-alone § 1983 action, and each seeking only incremental relief (collectively leading to a final habeas step)?

Petitioner plainly would answer "yes." See Brief for Petitioner 14, 17-18. If he is correct that courts may look no further than the specific, literal relief requested and must treat a § 1983 claim in a self-defined vacuum, then he and many others can easily state a § 1983 claim. His request (at the moment) is simply for postconviction discovery of DNA evidence, and he studiously avoids (for the moment) any demand for release.

But if anything more than the most mechanical reading of a complaint is permitted, then the opposite result follows—courts will hold claims like petitioner's to be an attempted end-run around the exclusivity of habeas corpus. For this reason respondent would answer "no" to the question posed above. See Brief for Respondent 26. Unless courts must not contemplate the obvious, they will recognize that seeking evidence to prove innocence is inseparable from an attempt to show that a jury got the verdict wrong.

This Court's disposition, then, turns on which answer *it* would make. If the Court agrees with petitioner that § 1983 cognizes proto-habeas (or semi-habeas) actions, then it should reverse the judgment below in full recognition of the vast expansion of federal jurisdiction that would ensue. But if the Court concludes that splitting a habeas claim does not generate a parcel of cognizable § 1983 claims, it should affirm. And because nothing in the Court's case law endorses chopping a habeas claim into multiple bite-sized litigation nuggets, and relabeling all of them—save the last—as merely "civil-rights actions" brought under § 1983, it should take that latter course.

B. This Court's cases do not support allowing habeas applicants to label components of a habeas claims as stand-alone § 1983 actions

Petitioner would read the Court's cases as collectively constituting a judicially drawn roadmap to guide prisoners. Following its lead, they could draft artful complaints against state and local prosecutors (and others), thereby unlocking access to collateral litigation in the more comfortable and less demanding context of § 1983 rather than in the traditional and carefully calibrated context of habeas corpus. Section 1983 pleading will be more a matter of tactics than of substance if phrases like "necessarily impl[ies] the invalidity of his conviction or sentence," *Heck*, 512 U.S. at 487, are entirely decontextualized from the plaintiff's objective to achieve precisely that goal.

But this Court's cases draw no such map. The Court's first effort to grapple with the distinction between habeas and § 1983 was motivated by the opposite concern—to *prevent* clever drafting from trumping the substance of the law and thereby allowing potential § 1983 plaintiffs to "evade [habeas] requirement[s] by the simple expedient of putting a different label on their pleadings." *Preiser*, 411 U.S. at 489-490.

Nor has any subsequent case permitted such an evasion. Every case testing the proper demarcation between habeas and § 1983 has firmly classified any claim touching on the integrity of the state-court criminal proceedings as belonging to the realm of habeas corpus. When the Court has found the connection to be "too tenuous," *Dotson*, 544 U.S. at 78, it has been because the claim was *not* merely part of a chopped-up habeas action, but rather sought a legitimate stand-alone remedy restoring civil rights to a plaintiff *without* a particularized effect on conviction or custody:

Challenge to the trial-court proceedings or the duration of confinement	**Challenge not based on individual confinement conviction, or sentence**
Preiser v. *Rodriguez*, 411 U.S. 475 (1973): Actual release delayed because of deprivation of good-time credits	*Muhammad* v. *Close*, 540 U.S. 749 (2004): Money damages sought from prison guard for making retaliatory accusations
Wolff v. *McDonnell*, 418 U.S. 539 (1974): Actual release delayed because of procedures resulting in forfeiture of good-time credits	*Wolff* v. *McDonnell*, 418 U.S. 539 (1974): Declaratory judgment that disciplinary procedures were *generally* invalid
Heck v. *Humphrey*, 512 U.S. 477 (1994): Money damages sought to vindicate allegedly unlawful conviction	*Nelson* v. *Campbell*, 541 U.S. 637 (2004): Injunction sought against particular method of execution

Edwards v. *Balisok*, 520 U.S. 641 (1997): Declaratory relief and damages for deprivation of individual good-time credits	*Wilkinson* v. *Dotson*, 544 U.S. 74 (2005): Declaratory and injunctive relief sought to compel use of lawful parole procedures[3]
	Hill v. *McDonough*, 547 U.S. 573 (2006): Injunction against specific three-drug sequence for lethal injection

The natural location both for this case and for *Osborne* is on the left side of this division, with claims cognizable only in habeas corpus. Both cases involve pursuit of particular evidence to demonstrate the claimant's innocence and thereby undermine a state-court conviction. Prisoners' claims are not, of course, automatically categorized as habeas claims simply because they are prisoners' claims—so long as the relief they seek is only distantly related to their specific and individualized claims of innocence or earlier release. But piecemeal litigation of the steps that, taken together, would invalidate a conviction or sentence, does not make that objective less plain when there is no other agenda (such as rectifying unconstitutional conditions of confinement)—and where the very basis of suit involves evidence allegedly material to the correctness of a state-court jury's verdict.

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[3] *Wilkinson* v. *Dotson*, 544 U.S. 74 (2005), merits additional discussion because the parties strongly contest its meaning. Brief for Petitioner 14-20; Brief for Respondent 32-33. In *Dotson*, the Court held that challenges to Ohio parole procedures were cognizable under § 1983 because "neither prisoner's claim would necessarily spell speedier release, [and] neither lies at 'the core of habeas corpus.'" *Dotson*, 544 U.S. at 82 (citing *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973)). Notably, however, neither challenge was individualized; each challenged generally applicable procedures, not any deprivation *particular to the plaintiff* that would get him out of prison sooner. *Id.* at 76-77. But in this case, petitioner is not seeking any generalized declaration—*he wants evidence from his own case to show his own innocence.* If the evidence petitioner seeks is what he says it is, it could not avoid undermining the strength of the state-court conviction, whether he specifically asks for relief or leaves it formally unspoken. Cf. *Dist. Attorney's Office for the Third Judicial Dist.* v. *Osborne*, 129 S. Ct. 2308, 2325 (2009) (Alito, J., concurring).

To be clear, the NDAA does not argue that petitioner's construction of the cases is devoid of all support. The federal courts of appeals have largely agreed with his position. See Brief for Petitioner 21-22. But these decisions have focused too narrowly on whatever chopped-up segment—the part of a habeas claim that was sliced out and rechristened under § 1983—was immediately before them. They ask whether the relief requested in that single segment—access to DNA—necessarily implies the invalidity of the prisoner's confinement. See *Durr* v. *Cordray*, 602 F.3d 731, 736 (6th Cir. 2010); *Grier* v. *Klem*, 591 F.3d 672, 678 (3d Cir. 2010); *McKithen* v. *Brown*, 481 F.3d 89, 102-103 (2d Cir. 2007); *Savory* v. *Lyons*, 469 F.3d 667, 672 (7th Cir. 2006); *Osborne* v. *Dist. Attorney's Office for the Third Judicial Dist.*, 423 F.3d 1050, 1054-1055 (9th Cir. 2005); *Bradley* v. *Pryor*, 305 F.3d 1287, 1291-1292 (11th Cir. 2002). This is, of course, the framework that petitioner urges in this Court. Brief for Petitioner 17-18. With the question thus framed, the proper result seems obvious, since some additional step in reliance on possession of exculpatory DNA (rather than the mere possession itself) is required to undo the conviction or the confinement.

But as shown in the chart above, a rigid insistence on accepting a plaintiff's determination of what effect relief in a § 1983 suit would have on his conviction or sentence is not a fair description of how this Court has actually decided its cases. The actual, immediate relief sought is the wrong analytical focus under *Heck*,[4] where the prisoner disclaimed any formal modification of his conviction or sentence, and argued that payment of damages implied nothing about the validity of confinement. Rather, the Court asked whether "the *basis* for the damages claim" necessarily implied the invalidity of the prisoner's confinement. *Heck*, 512 U.S. at 481-482, 487 (emphasis added). It disregarded artful pleading that attempted to make a very real link to the state-court conviction *seem* tenuous—the worry in *Preiser*. Petitioner here also formally disclaims any relief that necessarily undoes his conviction or sentence, but does so only by a candidly expressed plan to litigate the issue piecemeal. Brief for Petitioner 18. But, as in *Heck*, the only conceivable result here—assuming the allegations are correct—is to undermine the state-court conviction.

C. Claims like petitioner's fall under habeas because they necessarily undermine state-court criminal proceedings

There is nothing tenuous about the relationship between postconviction discovery and undermining the conviction or sentence. That was the reason petitioner sought the very same relief in habeas corpus that he now seeks through § 1983. See J.A. 17. If the evidence does what petitioner says it will do—potentially show his innocence—then it is *directly* connected to undermining the result in the state court. This suit will result in concrete action that cuts to the heart of state-court criminal proceedings—either handing over, or refusing to hand over, the State's evidence of guilt or innocence.[5] Such specific, individualized relief is entirely distinct from the type of generalized declaration or injunction about procedural rights that the Court regarded as appropriate subject matter for § 1983 in earlier cases. See, *e.g.*, *Dotson*, 544 U.S. at 82.

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[4] Along with *Dotson*, petitioner cites *Hill* v. *McDonough*, 547 U.S. 573 (2006), for the proposition that what matters to this Court is the "actual *immediate* consequences of a successful suit," Brief for Petitioner 16 (emphasis added). But rather than concern with "immediate" consequences, *Hill* turns on the same question asked in *Heck* and *Dotson*—whether the prisoner's request challenges the fact or duration of the prisoner's confinement. Summarizing the distinction between habeas corpus and § 1983, the Court stated: "'Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus.' An inmate's challenge to the circumstances of his confinement, however, may be brought under § 1983." *Hill*, 547 U.S. at 579 (quoting *Muhammad* v. *Close*, 540 U.S. 749, 750 (2004) (*per curiam*) (citations omitted)). The Court reasonably concluded that Hill's challenge to the method of execution was a challenge to a condition of his confinement. *Id.* at 580.

Even if petitioner had not already demonstrated that postconviction discovery should be sought in habeas (by *having sought it* in habeas), it would be hard to imagine such a pursuit as anything *but* an ingredient of a habeas action, and his brief contemplates as much. Brief for Petitioner 18 (petitioner "may, at some future date, use the results of DNA testing of this evidence to initiate a separate proceeding challenging his incarceration"). Unlike, for example, a FOIA request, discovery is not a destination, but a litigation tool. Petitioner has not alleged any basis for seeking discovery as a supplement to intellectual, historical, or educational purposes. While petitioner attempts to distinguish his complaint from pretrial discovery rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963), see Brief for Petitioner 19 n.6, the demand for postconviction discovery is, if anything, *more* connected to an attack on a conviction because its purpose is to show that the jury got it wrong. See, *e.g.*, *Osborne*, 129 S. Ct. at 2325 n.1 (Alito, J., concurring) (postconviction requests for access to evidence (DNA or otherwise) aim at undermining conviction).

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[5] As one example of how the claim invariably verges into habeas terrain, petitioner's apparent belief that *Osborne* allows him to use § 1983 to vindicate a liberty interest in having the Texas courts properly apply the Texas statute, see Brief for Petitioner 6, would mean the federal court would have to evaluate the strength of the conviction in light of the evidence, see Tex. Code Crim. Proc. art. 64.03 (Vernon Supp. 2010). Such scrutiny by a federal district court of the final state-court decisions under petitioner's state-law DNA-access claim would also implicate the *Rooker-Feldman* concerns described by respondent. See Brief for Respondent 48-49.

Although formally invoking § 1983, the claim here reflects the motivations and demands that routinely fill habeas petitions—ineffective assistance of counsel and deprivation of exculpatory evidence. Petitioner cannot avoid describing his claim in terms that invoke the reasons that would be expected (and indeed have already appeared) in an application for a writ of habeas corpus:

- In his § 1983 complaint seeking postconviction discovery, petitioner described how his initial habeas petition had sought the same discovery. J.A. 17.
- And in the complaint, petitioner connected that demand for access to evidence to the allegation of his trial counsel's ineffective assistance: "Plaintiff filed a motion contending that DNA testing was necessary in order for Plaintiff to prove that he had been prejudiced by his counsel's failure to ask for the testing prior to trial." J.A. 17.
- The petition for a writ of certiorari in this Court, naming "the real murderer," candidly described the lack of DNA evidence *in the state-court criminal trial* as making that trial deficient: "The evidence presented at trial of [the victim's uncle]'s possible involvement only scratched the surface of what was available and could have been presented." Petition 11.
- And the petition reiterated the connection between ineffective assistance of counsel and the lack of the

> evidence: "Mr. Skinner showed in his federal habeas proceeding that his trial counsel stopped their investigation of him without having a strategic justification for doing so, and thus failed to discover far more troubling information." Petition 11.

However packaged, a claim for discovery and a motivation to rectify ineffective assistance of counsel lie in the heartland of habeas litigation. See, *e.g.*, *Strickland* v. *Washington*, 466 U.S. 668, 697 (1984) ("An ineffectiveness claim * * * is an attack on the fundamental fairness of the proceeding whose result is challenged[, and] fundamental fairness is the central concern of the writ of habeas corpus."); see also *Osborne*, 129 S. Ct. at 2326 (Alito, J., concurring) (discovery challenges not cognizable under § 1983). Thus, for good reason, this Court has never authorized a § 1983 claim on either of the points that undergird petitioner's claim here—to seek discovery or to correct a deficiency caused by ineffective assistance. And *amicus* is aware of no federal appeals court decisions allowing either goal—until the postconviction DNA-access claims in cases like this one.

Nor is there any textual reason to conclude that suits under § 1983 must inexorably be permitted. Rather, the statutory text contemplates *various* alternative means of achieving a single end—the requirement that one who violates another's federal rights under color of state law be held accountable in federal court. It states that the party alleged to have deprived a person "of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, *or other proper proceeding* for redress * * *." 42 U.S.C. § 1983 (emphasis added). There can be no doubt that habeas is the "proper proceeding" for undertaking to show that the jury's conclusion of guilt was wrong.

Aside from its explicit reference to such other proceedings, § 1983 is a broad and generally applicable vehicle for remediation of civil-rights violations under color of state law. *Preiser*, 411 U.S. at 489-490. But the federal habeas statutes do this too, with laser-light precision, in the context of the review of state-court criminal proceedings. See 28 U.S.C. §§ 2241-2254. Those statutes already provide the means by which the federal courts may, consistent with bedrock notions of federalism, remediate any state-court violation of federal law in the course of a criminal proceeding resulting in conviction. *Preiser* initially invoked the doctrine that the specificity of habeas relief withdrew the core of that subject from scrutiny under the more general standards of § 1983. 411 U.S. at 489-490. The doctrine that "in most contexts, a precisely drawn, detailed statute pre-empts more general remedies," *Hinck* v. *United States*, 550 U.S. 501, 506 (2007) (internal citations and quotations omitted), remains the rule today. See also, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general.").

D. Prosecutors routinely defend criminal litigation—including evidentiary decisions—before federal judges though habeas corpus

State and local prosecutors routinely address claims involving core elements of state-court criminal prosecutions—including evidentiary issues—through federal habeas corpus proceedings. This system is the time-honored and carefully calibrated method to test whether federal rights have been respected in state-court criminal trials. See, *e.g.*, L. Yackle, Postconviction Remedies § 2.1 (2010). And as petitioner knows from his own prior federal habeas claim, habeas petitioners may seek discovery when courts regard it as appropriate to resolving the issues presented. Rules Governing Section 2254 Cases, Rule 6.

But petitioner would upend this functional system by transforming prosecutors into defenders not of judgments of conviction under state-court proceedings, but defenders of *themselves* as alleged violators of civil rights. Indeed, under petitioner's approach, prosecutors would potentially be defendants in seriatim § 1983 suits leading up to a final habeas push once all the dominoes are in place. Revealingly, however, the results sought are the same—while § 1983 places the prosecutor in a more vulnerable (and the prisoner in a more relaxed) position than habeas, what petitioner wants through § 1983 is what he has already sought through habeas. A ruling that § 1983 cognizes attempts to compel production of evidence of innocence or guilt would therefore expand federal jurisdiction over collateral attacks on state-court proceedings from one into two separate and discrete types of challenges. Maintaining habeas as the exclusive vehicle for federal courts to test state-court convictions would avoid the comity and federalism concerns that would follow from dramatically expanding federal jurisdiction under § 1983. See *Osborne*, 129 S. Ct. at 2325 (Alito, J., concurring) ("It is no answer to say, as respondent does, that he simply wants to use § 1983 as a discovery tool to lay the foundation for a future state postconviction application * * * . Such tactics implicate precisely the same federalism and comity concerns that motivated our decisions (and Congress') to impose exhaustion requirements and discovery limits in federal habeas proceedings.").

A second concern about naming prosecutors as civil-rights defendants is that it takes decisionmaking about a particular convict's postconviction litigation away from the system designed for it—direct appeals and state and federal habeas—and transfers that authority to attorneys representing the prosecutor in a civil case. In some cases the § 1983 defendant will be represented by government lawyers, but in others—as in this very case—the prosecutor will be represented solely by his or her own *private* attorneys. In either case, the performance of counsel representing prosecutors will not only determine the prosecutor's "liability," as in any § 1983 claim, but will have a dispositive effect *on the criminal litigation itself.* In this case, the prosecutorial function of whether or not to disclose evidence will be decided by litigation where the prosecutor herself is the client.[6] Litigation under § 1983 compels such a division of interests—where the prosecutor is personally the defendant but the case aims to affect the still-valid criminal conviction of the § 1983 plaintiff—whereas in habeas corpus, the interests of the State in obtaining a just result and the prosecutor's interest in exercising discretion to achieve that result are aligned.

When the underlying legal issue concerns the guilt or innocence of the claimant, this Court's decisions have uniformly channeled the claim through habeas corpus, an ancient writ which has evolved to serve such purposes. Converting prosecutors into § 1983 defendants would undermine this practice, erode the role of habeas corpus, and unjustifiably expand federal jurisdiction.

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[6] Criminal prosecution has been a state monopoly for centuries. See, *e.g.*, *Huntington* v. *Attrill*, 146 U.S. 657, 669 (1892). Expanding § 1983 in the context of decisions directly affecting postconviction litigation may be the closest that federal courts will come to having private prosecutors—private law firms, like Sprouse Shrader Smith P.C. and Yetter Coleman LLP, which represent the respondent in this case—making litigation decisions that will result in *discovery of evidence* being granted or denied. In this sense attorneys who do not work for the State are litigating decisions that could amount to defending the State's prosecution.

E. Transforming habeas actions into a series of § 1983 actions would engender undue inefficiency and delay

The chief threat to the administration of the criminal-justice system is *not* that DNA evidence will be produced—most States have statutory standards *requiring* postconviction access to DNA evidence in appropriate circumstances. *Osborne*, 129 S. Ct. at 2322. Rather, it is the inappropriate expansion of federal jurisdiction and the ability of future plaintiffs to use a decision authorizing § 1983 suits as a tool for delay.

After *Osborne*, petitioner and those like him are unlikely in the extreme to make headway in finding any federal due-process violation in the state-law standards for releasing DNA evidence. See 129 S. Ct. at 2319-2320. Yet it is in the remote hope of persuading a federal court to grant such relief that petitioner now describes the nature of the § 1983 complaint that he has filed. Brief for Petitioner 6 (citing *Osborne*, 129 S. Ct. at 2319-2320).

The consequence is not, therefore, that federal courts are actually likely to order disclosure when a prosecutor has declined to produce evidence. It is rather that such meritless claims will imprudently and unjustifiably divert so many resources. Unlike collateral attacks brought under habeas corpus, § 1983 claims do not require claimants to exhaust their state remedies. See, *e.g.*, *Patsy* v. *Bd. of Regents of Fla.*, 457 U.S. 496 (1982). Thus, prisoners will undoubtedly follow the procedurally more painless path of § 1983 rather than the exacting procedures governing habeas claims. And though frivolous claims may ultimately be dismissed under either statute, § 1983 lacks the procedural safeguards to promptly dispose of them as habeas does. Compare, *e.g.*, *Mayle* v. *Felix*, 545 U.S. 644, 669-670 (2005) (Souter, J., dissenting) ("As the Court concedes, the purpose of the heightened pleading standard in habeas cases is to help a district court weed out frivolous petitions before calling upon the State to answer."), with *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (no "heightened pleading standard" for § 1983).

Further, a newly muscular § 1983 cause of action will open the door to the sort of parallel litigation this Court decried in *Heck*. 512 U.S. at 484. As the Court noted, malicious prosecution actions require a "termination of the prior criminal proceeding in favor of the accused" in order to avoid "parallel litigation over the issues of probable cause and guilt." *Ibid.* (internal quotation omitted). Holding that the petitioner's claim does not "necessarily imply" the invalidity of his sentence would thus permit such parallel litigation, as he pursues remedies under both § 1983 and habeas—as, in fact, petitioner has done. Brief for Petitioner 5 n.2.

If the Court authorizes suits under § 1983 that are almost certainly meritless, the likely consequence will not be improved processing of DNA-access claims, but delay in reaching finality, particularly in capital cases.[7] The NDAA does not question petitioner's good faith in pursuing relief in this case, but accepting his view of the law would draw a roadmap for others to enlist federal courts solely to generate additional delay and needless expense. As described more fully below, see *infra*, pp. 26-28, the NDAA and its membership have no objection to the post-conviction disclosure of evidence in appropriate cases—

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[7] Not all postconviction DNA-testing claims involve capital cases (*Osborne* was not), but as petitioner notes, they are a core source. Petition 25. Given that the Fourth and Fifth Circuits—two of the busiest capital-case circuits—are among those which currently do not cognize § 1983 claims for postconviction discovery, a reversal in this case would likely generate substantial additional § 1983 litigation in those circuits.

but they do request that long-established law not be undermined in order to provide what in most cases will be fruitless efforts to pursue that evidence under federal law.

II. REQUIRING PROSECUTORS TO RESPOND TO CHALLENGES UNDERLYING STATE-COURT CONVICTIONS UNDER § 1983 RISKS NEEDLESSLY DELETERIOUS CONSEQUENCES

Authorizing the use of § 1983 to seek postconviction access to evidence—even if cabined by the substantive limits described in *Osborne*—will create a new category of federal litigation for district attorneys nationwide. And if petitioner's analysis is adopted, there would be no principled reason—as petitioner candidly notes—that prisoners could not use it to seek *any* type of evidence, whether DNA or otherwise. *E.g.*, Petition 26 ("The issue presented in this case implicates other issues beyond the scope of relief in the form of DNA testing, including other kinds of evidentiary requests and challenges by prisoners to various actions taken by state officials."). Indeed, so long as the relief demanded in that particular filing did not automatically and instantaneously invalidate the conviction or lead to speedier release, *any* kind of complaint dealing with state-court criminal proceedings—trial procedures, evidentiary sufficiency, jury misconduct—would be cognizable under § 1983.

Although many—or most—such claims would presumably be readily dismissed, the injury to the administration of justice will inhere in the exposure to an onslaught of litigation with potentially debilitating costs in funds and energy (even if damages will rarely be appropriate parts of the § 1983 suits that will proliferate, see *Imbler* v. *Pachtman*, 424 U.S. 409 (1976)).[8] It is consistent neither with this Court's cases, see *supra* Part I, nor with the effective prosecution of crime, to subject prosecutors to § 1983 liability with respect to matters touching on the guilt or innocence of a prisoner whose conviction remains intact. Litigating any issue within that scope under § 1983, and at any time, would be needlessly burdensome. But postconviction DNA-access claims—especially in today's economic climate of straitened state finances—present particularly noteworthy challenges. At best, those challenges will give prisoners additional and unjustifiable additional bites at the apple at the expense of prosecutors' time, energy, and resources; and they will quite likely undermine state-law procedures for the appropriate release of DNA as well.

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[8] Despite observing the broader implications of potential success in this case—*i.e.*, the expansion of § 1983 beyond DNA evidence—

1. An upswing in demand for postconviction access to DNA evidence (at minimal cost to prisoners with relatively little to lose), could amount to a substantial increase in § 1983 litigation for district attorneys across the nation.[9] Experts estimate that biological evidence that could be subjected to DNA testing is obtained only in five to ten percent of all criminal cases. See Unvalidated or Improper Forensic Science, http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php (as

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petitioner unconvincingly asserts that "[t]here is no reason to fear that the federal court system will be flooded with lawsuits" if the Court authorizes § 1983 for postconviction discovery. Brief for Petitioner 31. He offers no substantive explanation for why others in other contexts would not wish to make use of the same tool he seeks. And even in his own context, he agrees that "§ 1983 claims for DNA testing are not rare." *Id.* at 31-32.

[9] Frivolous claims can generate consequences for prisoners. See, *e.g.*, *Crawford-El* v. *Britton*, 523 U.S. 574, 596 (1998) (describing effects of Prison Litigation Reform Act). More specifically with respect to DNA claims, legislatures are considering penalties for frivolous demands for DNA evidence. See, *e.g.*, Tex. H.B. 2371, 81st Leg., R.S. (2009).

visited Sept. 14, 2010). However, when this statistic is considered in the context of the hundreds of thousands of criminal prosecutions handled every year,[10] the raw number of cases that could eventually be subject to postconviction DNA requests—before considering the claims for *other* types of discovery in all cases—becomes abundantly clear. And as scientific methods become more sophisticated and collection efforts improve, there is no reason to think that this number would not increase—indeed, some state statutes specifically contemplate this. See *Osborne*, 129 S. Ct. at 2317. If § 1983 cognizes each of these claims, virtually any convicted defendant can transmogrify his state criminal case into a federal civil-rights lawsuit—and state and local prosecutors can anticipate receiving and filing responses to substantial numbers of filings.

Worse, giving so much attention to the *least* meritorious DNA claims cannot help but distract from testing samples that merit it. "[O]ne of the biggest problems plaguing the justice community is the backlog of untested evidence." Kreeger & Weiss, DNA Evidence Policy Considerations for the Prosecutor 11, Am. Prosecutor's Research Institute, Special Topics Series (Sept. 2004), available at http://www.ndaa.org/pdf/dna_evidence_policy_considerations_2004.pdf (as visited Sept. 14, 2010). In 2003, the national DNA backlog stood at 542,000 samples awaiting testing. U.S. Dep't of Justice, National Institute of Justice, 2004 Annual Report 2 (2004). Through efforts of Congress and the White House, this number has been reduced, but it is estimated that the backlog still stands at nearly 400,000 samples. Moore, Progress is Minimal in Clearing DNA Cases, N.Y. Times, Oct. 25, 2008, p. A9.

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[10] Annual *felony* convictions can exceed one million in the state-court systems alone. See, *e.g.*, Sourcebook of Criminal Justice Statistics Online, http://www.albany.edu/sourcebook/pdf/t5442004.pdf (as visited Sept. 14, 2010).

For example, "[a] typical lab performing DNA testing in 2005 began with a backlog of 86 requests for DNA analysis, received 337 new requests, completed 265 requests, and finished the year with 152 backlogged requests." U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Census of Publicly Funded Forensic Crime Labs 2005, at 5 (2008). Improvements in DNA testing technology may actually increase this backlog, as testing becomes more prevalent (or at least in demand) in property-crime investigations and other crimes where DNA evidence has not traditionally been used. See Banda, Thefts Solved by DNA Analysis; Usage Expands in Non-Violent Crime, USA Today, Oct. 20, 2006, p. 1A.

This combination of enormous backlog and increased demand for testing has created substantial staffing challenges for district attorneys' offices and crime labs. "Based on the average performance of a DNA analyst in 2005, laboratories performing DNA analysis would have needed an estimated 73% more staff to complete all DNA requests in 2005." Census of Publicly Funded Forensic Crime Labs 2005, *supra*, at 7. Increased testing of samples that do not meet the standards will add to the bottleneck that delays testing of higher-priority samples. (And handing over samples to private labs for privately-paid testing carries with it the consequence of entrusting evidence to non-governmental actors.)

2. This comes at a time when prosecutors' budgets—like those of most entities around the country—are strained at unprecedented levels. District attorneys' offices across the country are faced with the possibility of layoffs and furloughs as state and local governments grapple with dramatically reduced revenue streams. A press release from one prosecutor's office describes the

severe furloughs and pay reductions in his office as a result of budget pressure, concluding that his office "can't possibly cut more without imploding." See Prosecuting Attorney of Butler County, Ohio, Prosecutor's Office Reduces Budget, June 22, 2010, available at http://www.countyprosecutor.org/displayrelease.cfm?ReleaseID=195 (as visited Sept. 14, 2010). See also, *e.g.*, Elfrink, Budget Cuts at the Miami-Dade State Attorney's Office, Miami New Times, Feb. 19, 2009, available at 2009 WLNR 3410728. These cuts in staff, of course, have led to increased workloads for those that remain. See, *e.g.*, Meagher, Supervisors' Budget Misery: Department Heads Paint Picture of $38 Million Cut, Santa Barbara Independent, Feb. 25, 2010, p. 8 ("For prosecutors in the [Santa Barbara County] District Attorney's Office, which already sees more cases per attorney out of any California county, [a proposed reorganization] could mean an increase from the current 477 cases per attorney (up from 378 last year) to 567.").

Even more distressing, budget constraints have also led some district attorneys' offices to triage measures, so that some are unable to prosecute even serious misdemeanor crimes. See, *e.g.*, Lee, D.A. Cuts Efforts on Lesser Crimes, San Francisco Chronicle, Apr. 22, 2009, p. B1 ("Misdemeanors such as assaults, thefts and burglaries will no longer be prosecuted in Contra Costa County because of budget cuts, the county's top prosecutor said Tuesday."); Wright, Police Prepare to Crack Down on Holiday Crime, Carlsbad Current-Argus, Nov. 25, 2009, available at 2009 WLNR 23735630 ("Fifth Judicial District Attorney Janetta Hicks has announced that due to cuts in state funding, her office can no longer afford to prosecute misdemeanors other than DWI and household battery."); Singer & Ervin, Shortfall Projected—Prosecutor, Judges, Sheriff Warn of Cuts to Courts, Law Enforcement, Seattle Times, June 6, 2008,

p. B1 ("[L]ocal criminal-justice leaders said Thursday they plan to move thousands of property-crime, forgery and drug cases to lower-level courts and cut investigations of fraud, Internet crimes and cold cases."); Vielmetti, DAs Feel State Budget Cuts, Worry Over Possible Layoffs, Milwaukee Journal Sentinel, Jan. 26, 2010, available at 2010 WLNR 1662518 (district attorney's office "no longer would prosecute several types of misdemeanors, about 1,200 a year, if his office loses one of his six full-time assistants").[11]

Expanding § 1983 jurisdiction is wrong as a matter of law. But forcing district attorneys to dedicate resources to defending themselves in § 1983 suits—filed by plaintiffs who could seek the same relief in habeas—amounts to a colossal waste of resources that are urgently needed elsewhere.

3. Given the pressing needs described above, one potential result of the expansion of § 1983 could be to undermine the very legislative balancing that this Court described—and embraced—in *Osborne*, 129 S. Ct. at 2316-2317, 2322. State legislatures (like Congress) have developed regimes placing "certain conditions on access to the State's evidence." *Id.* at 2317. With the thousands of cases involving DNA evidence, combined with the destabilizing effect of an anything-goes policy toward demands for evidence, the justification for an orderly, rather than chaotic, solution is evident.

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[11] Even *before* the worst of the economic downturn, New Orleans prosecutors were so overwhelmed that they were forced to release *felony* suspects (including murder suspects, leading to the phrase "misdemeanor murder") after 60 days under a state statute that required the release of suspects who have not been indicted within that period of time. Filosa, Crime Thrives Under 60-Day Rule, The Times Picayune, Feb. 12, 2007, at http://www.nola.com/news/t-p/frontpage/index.ssf?/base/news-7/11712631133140.xml&coll=1.

Nor is prosecutorial stinginess regarding DNA an obvious problem calling out for federal solutions. District attorneys are not somehow *opposed* to the release of evidence. Indeed, they are uniformly bound to disclose exculpatory, material evidence to the accused before trial so that the accused may more effectively counter the prosecutors' case. See, *e.g.*, *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002) (citing *Brady*, 373 U.S. at 87). Prosecuting attorneys are not part of "a pure adversary model," because they are "the representative not of an ordinary party to a controversy, but of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." *United States* v. *Bagley*, 473 U.S. 667, 675 n.6 (1985) (internal quotation marks and ellipses omitted). And law enforcement must preserve evidence that "could have been subjected to tests, the results of which might have exonerated the defendant." *Arizona* v. *Youngblood*, 488 U.S. 51, 57-58 (1988). Similarly, the various state postconviction DNA-access statutes, see *Osborne*, 129 S. Ct. at 2316-2317, impose further disclosure obligations consistent with prosecutors' basic constitutional responsibilities.[12]

Prisoners are also protected by prosecutors' special ethical duties. Under a longstanding provision of the American Bar Association's Model Rules of Professional Conduct, prosecutors must "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." Model Rules of Prof'l Conduct

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[12] This case is about the appropriate *classification* of federal claims; the NDAA takes no position in this brief with respect to the appropriateness of second or successive habeas petitions in federal court in the context of actual-innocence claims.

R. 3.8(d) (2008).[13] See also National Center for Prosecution Ethics, Doing Justice: A Prosecutor's Guide to Ethics and Civil Liability 87-103 (2d ed. 2007). Prosecutors have both legal and ethical duties designed to ensure that evidence is properly shared with state prisoners and that the wrongly convicted are set free.

Consistent with these obligations, and far from any effort to "conceal" DNA evidence, prosecutors wish to follow applicable state law and procedure in providing it where appropriate. But if prosecutors are faced with a flurry of federal litigation in the unfamiliar context of § 1983, the severe shortages of human and financial resources may tip the balance between using available resources for prosecution or for fighting a federal lawsuit demanding evidence. In individual circumstances, such "settlements" may be sound husbanding of resources entrusted to the prosecutor by the people, and at first blush avoiding litigation may appear salutary. But if releases attributable to the press of § 1983 suits—rather than dispassionate agreement with the legal principle—the result would fundamentally undermine the very statutory development that *Osborne* sought to foster.

But the adverse consequences of destabilizing the carefully balanced legislative assessments regarding the appropriate times to hand over evidence are only part of the problem. First, with increased demands for (unjustified) testing, the backlogs described above would just grow; cases in which DNA evidence is most needed would be caught up in the chaos engendered by widespread claims. Thus, those postconviction demands which *are* valid and which state legislatures wish to honor will be obscured by the many federal claims which require filed responses but only divert energy from following a legislatively enacted protocol.

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[13] More recent amendments to the Model Rules—not yet fully adopted nationwide, but expressing standards for prosecutorial ethics everywhere—provide even greater postconviction protections with respect to disclosure of potentially probative evidence. See Model Rules of Prof'l Conduct R. 3.8(g) (2008); see also *id.* R. 3.8(h).

Second, a key scientific basis for reluctance to hand over DNA to all comers is the inherent fragility of the evidence. Overly generous access to DNA evidence raises concerns related to evidence consumption and contamination, and therefore to the integrity of the criminal-justice system. (Offers for private payment of testing in private facilities outside direct government supervision is only a partial answer for this reason, of course.) The amount of biological evidence collected at any crime scene is finite, and often only a small amount of the evidence collected is of testable quality—once the evidence is subjected to DNA testing, the amount used is consumed and thus unavailable for future tests. See D. Bruns et al., Fundamentals of Molecular Diagnostics 158 (2007) ("Evidentiary [DNA] material cannot be replenished and may be present in only trace amounts. Testing may consume the sample and thus complete or repeat testing may be impossible."). And, as Justice Alito noted in *Osborne*, "'[t]he extraction process is probably where the DNA sample is more susceptible to contamination in the laboratory than at any other time in the forensic DNA analysis process.'" 129 S. Ct. at 2327 (Alito, J., concurring) (quoting Murphy, The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing, 58 Emory L.J. 489, 493 (2008)). Thus, if prosecutors are forced to—or feel practically compelled to—turn over more and more evidence, the finite stores of testable evidence will quickly be depleted or rendered useless by contamination.

In at least these ways, widespread threats of § 1983 litigation would risk undermining the progress that, in light of *Osborne*'s analysis, should be nurtured rather than imperiled.[14] By maintaining habeas corpus as the vehicle for the federal review of state-court criminal proceedings, the Court will make it more likely that decisions about the release of evidence are based on legislative will and judgment rather than on risk-management or budgetary considerations.

CONCLUSION

Expanding federal jurisdiction into supervisory review over state-court criminal proceedings by making § 1983 an additional source of collateral attack is a step that this Court should not take. Its decisions do not require such a drastic step; it should instead recognize that when a § 1983 claim would empower a federal court to supervise any component of state-court criminal conviction that has not been overturned, that claim sounds in habeas. Practical considerations also inveigh against a dramatic shift in the exposure of prosecutors to § 1983 litigation. For these reasons stated above, and presented in respondent's brief, the Court should affirm the judgment of the Court of Appeals for the Fifth Circuit.[15]

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[14] Permitting § 1983 claims seeking access to postconviction DNA evidence would likely undermine state-law evidence-retention policies. See, *e.g.*, Ohio Rev. Code Ann. § 2933.82 (requiring preservation of biological evidence until the earlier of the inmate's release or 30 years); Tex. Code Crim. Proc. art. 38.43(c)(1) (Vernon Supp. 2010) (preservation "until the inmate is executed, dies, or is released on parole"). "Law enforcement agencies vary widely in terms of their policies for retaining forensic evidence, especially in cases where a defendant has been convicted of a crime." Storm et al., The 2007 Survey of Law Enforcement Forensic Evidence Processing, National Institute of Justice 3-9 (Oct. 2009), available at http://www.ncjrs.gov/pdffiles1/nij/ grants/228415.pdf. Cf. *Osborne*, 129 S.Ct. at 2323 (discussing problems with setting federal preservation standards pursuant to the Constitution).

[15] Respondent has suggested that the Court may find that the petition in this case was improvidently granted and dismiss on that basis. Brief for Respondent 50-53. The NDAA respectfully suggests that

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September 16, 2010

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the Court should instead decide the question presented and provide clarity that is needed throughout the country. While respondent is plainly correct that there are serious deficiencies in petitioner's arguments and in the posture of the case, such deficiencies will also exist in many cases presented to the lower courts (and in any event, petitioner argues that none of them is fatal to his claim).

AMICUS
CURIAE
BRIEF

No. 09-9000

In The
Supreme Court of the United States

◆

HENRY W. SKINNER,

Petitioner,

v.

LYNN SWITZER, DISTRICT ATTORNEY FOR
THE 31ST JUDICIAL DISTRICT OF TEXAS,

Respondent.

◆

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

◆

AMICI CURIAE BRIEF OF TARRANT COUNTY CRIMINAL DISTRICT ATTORNEY, ET AL., IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Joe Shannon, Jr. is the Criminal District Attorney for Tarrant County, Texas. The other *amici* joining in this brief are district or county attorneys in Texas. Texas district and county attorneys are statutorily required to participate in judicial proceedings under Chapter 64, Texas Code of Criminal Procedure, which authorizes a person convicted of a crime to file a motion in the convicting court to obtain DNA evidence for testing. *In re Guerra*, 235 S.W.3d 392, 407 n. 54 (Tex. App. – Corpus Christi 2007, no pet.) ("'The attorney representing the State' means the Attorney General, district attorney, criminal district attorney, or county attorney.") (citing TEX. CRIM. PROC. CODE ANN. art. 20.03 (Vernon 2005)). In this case, after twice unsuccessfully invoking Chapter 64 and pursuing a direct appeal and federal habeas, Petitioner Henry Skinner filed a federal civil rights suit seeking injunctive and declaratory relief based on 42 U.S.C. Section 1983 against District Attorney Lynn Switzer in her official capacity to obtain access to DNA evidence for testing.

The result sought in this case by Petitioner would allow persons to seek postconviction access to DNA evidence by initiating federal civil rights actions based on 42 U.S.C. Section 1983 even though statutory and constitutionally adequate state procedures with direct judicial involvement and oversight already exist. These actions would re-examine, in a federal civil case, issues and evidence already reviewed or which could have been raised in state criminal proceedings and/or federal habeas. This would effectively result in multiplicious litigation. In the event the Court rules in Petitioner's favor, prosecutors could be named as defendants in future suits, as was done in this case. Defending such actions would result in expense for legal representation and other litigation costs to Texas counties or the State of Texas. Procedural and substantive legal issues relating to accrual of the cause of action, proper defendant, types of damages and relief permitted, and immunity would arise and require resolution by the federal courts.

◆

SUMMARY OF THE ARGUMENT

Section 1983 actions should not be available to convicted persons where a facially constitutional postconviction DNA testing statute exists that provides for full judicial (trial and appellate) review. Chapter 64 (entitled "Motion for Forensic DNA Testing"), Texas Code of Criminal Procedure (hereinafter "Ch. 64") is such a statute. Ch. 64 is evolving through legislative action to meet the needs of the judicial system. It is working – not only is it facially constitutional as a result of built-in procedural protections and rights, but the available statistics also show that motions are being granted, sometimes resulting in exoneration, and therefore it is being applied in a constitutionally appropriate manner. The Texas Court of Criminal Appeals ultimately decides Ch. 64 DNA motions and federal and state habeas relief is available for DNA testing. Petition for writ of certiorari is also available to challenge the rulings of the state and federal courts. Allowing Skinner's claim would set a precedent that would consume time and resources of District Attorneys – they would be distracted by having to litigate these suits – and financial resources of counties or states to hire more staff would have to be expended. Unless the state attorney general undertakes the defense of these suits or a District Attorney's staff is sufficiently large or experienced in federal litigation, counties could be faced with the expense of hiring private law firms for representation of the civil rights defendants. There would be a multitude of difficult issues to resolve relating to both substantive and procedural law. Defending civil suits in federal courts involving postconviction DNA testing would distract Texas prosecutors from performing their traditional functions and statutory duties. Section 1983 suits filed for the purpose Skinner did would also delay justice for the victims.

Henry Skinner has had more than adequate due process, effective representation and extensive judicial review of the evidence in his case by state and federal courts. Allowing him to proceed with a Section 1983 suit to obtain additional DNA testing, "outside the process," as the Court said in *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct. 2308, 2319 (2009), would set a precedent that would have far reaching consequences for prosecutors and federal courts. *Osborne, id.* at 2323. It would provide persons convicted in Texas with a federal action to seek DNA testing regardless of the crime committed, the sentence imposed or when the conviction occurred. The Texas Legislature did not include a limitations period or restriction on the number of motions for postconviction DNA testing that a convicted person could file under Ch. 64. The Texas statute is not limited to capital offenses or to convicted persons who are still incarcerated. Persons who long since have served their sentences and have been released from confinement could still file Section 1983 suits after filing *unsuccessful* Ch. 64 motions. Section 1983 does not generally have an exhaustion requirement. Allowing Section 1983 to be used to obtain DNA testing could prompt the filing of large numbers of Chapter 64 motions in state courts as a vehicle to get to federal court with Section 1983 suits. Both state and federal courts would then have to review and adjudicate such claims. It would effectively, and as a practical matter, allow convicted persons who been unsuccessful in direct appeals, habeas actions and postconviction DNA testing applications to use Section 1983 as a "last resort" to take "one more shot" at challenging their convictions or sentences.

◆

ARGUMENT

The question presented in this case is whether Petitioner Henry Skinner can use Section 1983 to obtain postconviction DNA testing. The Texas prosecutors who have joined in this brief concur with and adopt the arguments of counsel of record for District Attorney Lynn Switzer relating to this issue and agree that the decision below should be affirmed on the grounds set out in Switzer's brief. Those arguments are ably and correctly made in Switzer's brief and will not be repeated in this *amici* brief. There are additional reasons for affirming the Fifth Circuit's decision that are addressed in this brief.

I. Chapter 64, Texas Code of Criminal Procedure, Provides for Adequate Procedural Due Process.

Petitioner's Complaint (¶¶32, 35) alleges that District Attorney Switzer violated his due process rights under the Fourteenth Amendment and subjected him to cruel and unusual punishment in violation of the Eighth Amendment:

> By refusing to release the biological evidence for testing, and thereby preventing Plaintiff from gaining access to exculpatory evidence that could demonstrate he is not guilty of capital murder, Defendant has deprived Plaintiff of his liberty interests in utilizing state procedures to obtain reversal of his conviction and/or obtain a pardon or reduction of his sentence. . . .

Nothing DA Switzer did or did not do prevented Petitioner from "utilizing state procedures" or caused the statute to be applied by the courts in a manner that denied him due process.

Chapter 64 is effective in achieving exonerations in appropriate cases and meets constitutional due process requirements, both facially and in its application to Henry Skinner. Petitioner Skinner filed two (2) motions for postconviction DNA testing utilizing Chapter 64, Texas Code of Criminal Procedure. *Skinner v. State of Texas*, 122 S.W.3d 808 (Tex. Crim. App. 2003); *Skinner v. State of Texas*, 293 S.W.3d 196 (Tex. Crim. App. 2009)

In *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct. 2308, 2319 (2009), the Court found that (1) the Alaska general postconviction relief statute was not facially unconstitutional and (2) Osborne had not properly invoked state procedure and therefore could not show that, "as applied," he had been denied procedural due process. Skinner does not claim that Ch. 64 is facially unconstitutional and cannot show that "as applied" to him, the procedure under Ch. 64 resulted in a denial of due process. Ch. 64 is facially constitutional and is equivalent to and includes the same or similar provisions as 18 U.S.C. Section 3600 (2004 Innocence Protection Act), the federal postconviction DNA testing statute.

The issue relating to the claim by Skinner of an unconstitutional application of Ch. 64 in his case is whether the courts which decided his cases failed to utilize or incorrectly used the procedures set forth in the statute or arbitrarily denied testing (for reasons that were fundamentally unfair or illogical and disregarded whether testing, if done, would have had a reasonable probability of developing evidence that could realistically show that he was innocent). Skinner has not claimed any facial deficiency nor has he clearly specified what procedures were not afforded him or convincingly demonstrated why grounds identified by the courts which reviewed his Ch. 64 motions were arbitrary or illogical. He apparently contends District Attorney Switzer's denial of his requests to gain access to or test DNA is the constitutional tort on which his Section 1983 claim is based. Switzer was not obligated to voluntarily give Skinner access to DNA evidence or to test DNA evidence after his conviction. Ch. 64 affords convicted inmates access to DNA for postconviction testing through a comprehensive judicial process.

Switzer was not required or obligated to give Skinner access to DNA evidence or to test DNA evidence because the trial court and Court of Criminal Appeals decided he was not entitled to access or testing. The results and grounds are reported in the following cases:

Skinner v. State of Texas, 122 S.W.3d 808, 811 (Tex. Crim. App. 2003):

> Article 64.03(a)(2)(A) requires the convicted individual to establish by a preponderance of the evidence that a reasonable probability exists that he or she would have not been prosecuted or convicted if exculpatory results had been obtained through DNA testing . . . . [T]he presence of a third party's DNA at the crime scene would not constitute affirmative evidence of innocence.

> See *Bell*, 90 S.W.3d at 306. The standard required by this Court to grant testing under Chapter 64 is affirmative evidence of innocence. *Kutzner*, 75 S.W.3d at 438-439.

Skinner v. State of Texas, 293 S.W.3d 196, 197 (Tex. Crim. App. 2009):

> At appellant's trial, some evidence was tested for DNA, and some was not. State and federal district courts have both found that defense counsel had a reasonable trial strategy for not requesting the testing of the untested items. Some of the remaining items were subsequently tested. Appellant now requests testing of items that still remain untested. We hold that, in the usual case, the interests of justice do not require testing when defense counsel has already declined to request testing as a matter of reasonable trial strategy.

[In addition to his trial defense counsel, Petitioner was represented by no less than four (4) attorneys for the direct appeal of his conviction, state and federal habeas and Ch. 64 motions.]

The federal postconviction DNA testing statute (18 U.S.C. Section 3600) (approved in *Osborne*, at 2317) includes procedures similar to those found in Ch. 64. The Texas statute is even less restrictive than the federal statute. Section 3600:

(1) requires the movant to assert that he is actually innocent;

(2) imposes a time limit for submitting a motion (within 36 months of conviction);

(3) requires exhaustion of state remedies for requesting DNA testing;

(4) requires the movant to identify a theory of defense not inconsistent with a defense at trial and which would establish the actual innocence of the movant.

Texas Ch. 64 contains none of the foregoing restrictions. Both statutes provide for filing of a motion for DNA testing with the convicting court and allow appointment of counsel and testing, both at government cost upon a showing of indigency. Art. 64.02 requires that within 60 days of receipt of the motion from the court, the attorney representing the state shall "deliver the evidence to the court" or "explain in writing to the court why the state cannot deliver the evidence to the court." Art. 64.02(b) also permits the court to proceed if the response period for the state's attorney to respond has expired, regardless of whether the state's attorney has responded. Art. 64.04 requires the convicting court to hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would have not been convicted. Art. 64.05 permits appeal from the convicting court "in the same manner as an appeal of any other criminal matter, except that if the convicted person was convicted in a capital case and was sentenced to death, the appeal is a direct appeal to the court of criminal appeals."

In *Thompson v. Fernandez*, No. 10-10029, 2010 WL 3279158, *3 (11th Cir. Aug. 20, 2010), the Eleventh Circuit recently analyzed the Florida postconviction DNA testing statute as follows:

> First, Thompson fails to make the "difficult" showing that Rule 3.853 [Fla.R.Crim.P.] (2010) is facially invalid because Rule 3.853 contains similar requirements and limitations imposed by other DNA-testing statues, [sic] including the postconviction statute upheld in *Osborne*, 129 S.Ct. at 2317-18, 2320-21. . . . Specifically, both Rule 3.853 and the statute upheld in *Osborne* (1) require the claimant to make a sufficient showing that the additional DNA testing could demonstrate his actual innocence, (2) exempt the claim from applicable time limits, and (3) provide a successful claimant access to additional DNA testing. Compare Fla. R.Crim.P. 3.853 with *Osborne*, 129 S.Ct. at 2117-18, 2320-21 (describing the Alaska postconviction statute). Moreover, the federal postconviction DNA-access statute, 18 U.S.C. Sec. 3600, which *Osborne* cites with approval, overlaps with Rule 3.8.53 by requiring the prisoner to assert that (1) he is actually innocent, (2) the evidence sought has not been previously tested for DNA or that subsequent DNA testing techniques could produce a more definitive result, and (3) the prisoner's identity was a disputed issue at trial. Compare Fla.R.Crim.P. 3.853, with 18 U.S.C. § 3600. Accordingly, we conclude that Thompson has failed to show that Rule 3.853

> "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" or "transgresses any recognized principle of fundamental fairness in operation." *Osborne*, 129 S.Ct. at 2321 (quotation marks omitted).

Chapter 64 is sufficient in this respect and, as it seems the majority in *Osborne* required, a convicted person would be required to show how he had been denied procedural due process. It is not however necessary to invoke Section 1983 to assert the claim that the Ch. 64 was applied erroneously in a particular case since that judicial determination may be reviewed on appeal under current state and federal procedures.

Since Chapter 64 of the Texas Code of Criminal Procedure was first enacted and became effective in 2001, the Texas Legislature has provided inmates in Texas with two (2) separate provisions for additional postconviction forensic testing: Chapter 64 and Article 11.07 of the Texas Code of Criminal Procedure. Art. 11.07 was enacted by the legislature in 2007 and essentially provides for testing of non-DNA evidence in non-death penalty habeas cases. If Petitioner's argument that he is entitled to pursue a Section 1983 action is accepted, that would arguably mean that, by enacting postconviction evidence testing statutes (Ch. 64 and Art. 11.07), the Texas legislature also created an opportunity to bring "as applied" procedural due process Section 1983 causes of action for both DNA and non-DNA (toxicology, fingerprint analysis, ballistics, drug chemical analysis, etc.) testing. Ch. 64 allows DNA testing in both felony and misdemeanor cases regardless of whether the convicted person is still serving a sentence or has been released and discharged. As described below, these statutes have been amended to meet needs of the court system, prosecutors and convicted defendants in preventing wrongful convictions. As a result, these laws are more than adequate to provide procedural due process and are better suited to accommodate appropriate postconviction DNA testing than Section 1983. Ch. 64 has been effective in the Texas criminal justice system to allow review and exoneration in appropriate cases and has evolved to address practical issues relating to postconviction DNA testing. Ch. 64 has been amended twice, in 2003 and 2007. These changes have been made to clarify the statute and to respond to judicial interpretations of its provisions.

Chapter 64 of the Texas Code of Criminal Procedure essentially provides a mechanism for a convicted person to request postconviction DNA testing if he or she can demonstrate:

a. there is evidence that is in a condition making DNA testing possible;

b. identity is or was at issue; and

c. there is a 51% chance (preponderance of evidence) that the person would not have been convicted if the DNA testing result was exculpatory.

II. Texas Legislature has Continued to Enhance Chapter 64 Postconviction DNA Testing Procedures.

Since Ch. 64 was enacted in 2001, the Texas Legislature has responded to the following issues identified by the courts and others relating to DNA testing requests under the statute:

- **Preservation of Biological evidence.**

  Resolution: At the same time Ch. 64 was created, Article 38.39 (now Article 38.43) of the Texas Code of Criminal Procedure was enacted to ensure preservation of evidence containing biological material. Added by Acts 2001, 77th Leg., ch. 2, § 1, eff. April 5, 2001.

- **Article 64.01.** DNA testing previously conducted in a case.

  Resolution: Ch. 64 allows for new DNA testing even if prior testing of that evidence was conducted if newer testing techniques would provide "more accurate and probative results." TEX. CRIM. PROC. CODE ANN. art. 64.01(b)(2) (Vernon 2006).

- **Article 64.01.** Convicted person previously filed a motion for DNA testing and wants to file a new one.

  Resolution: Ch. 64 "does not prohibit a second, or successive motion for forensic DNA testing." *Ex parte Baker*, 185 S.W.3d 894, 897 (Tex. Crim. App. 2006).

- **Article 64.01.** The original version of the statute required appointment of counsel if the defendant requested it. Ch. 64 motions frequently have no merit. (Examples: request to test gunshot residue; all evidence has been destroyed or deteriorated; offense not conducive to DNA testing (e.g., theft)).

  Resolution: Amendment in 2003 requiring the defendant to show "reasonable grounds for a motion to be filed." Acts 2003, 78th Leg., ch. 13, § 1, eff. Sept. 1, 2003.

- **Article 64.01.** Timely appointment of counsel by trial courts.

  Resolution: Amendment in 2007 that the trial court must appoint counsel "not later than the 45th day after" determining reasonable grounds exist for a motion to be filed. Acts 2007, 80th Leg., ch. 1006, § 2, eff. Sept. 1, 2007.

- **Article 64.011.** Guardian or other legal representative authorized to file Ch. 64 motion for convicted person unable to file motions due to age or incompetency.

  Resolution: Article 64.011 enacted. Acts 2003, 78th Leg., ch. 13, § 2, eff. Sept. 1, 2003.

- **Article 64.02.** The State timely provides the court with a list of evidence.

  Resolution: The State must now comply with Article 64.02 within 60 days after the motion is served on the State. Acts 2007, 80th Leg., ch. 1006, § 3, eff. Sept. 1, 2007.

- **Article 64.03.** The standard ("preponderance of the evidence that a reasonable probability exists") revised.

  Resolution: Removed "reasonable probability" to clarify. Acts 2003, 78th Leg., ch. 13, § 3, eff. Sept. 1, 2003.

- **Article 64.03.** The Court of Criminal Appeals held that a confession was sufficient to prove identity and therefore bar DNA testing. *See Bell v. State*, 90 S.W.3d 301, 308 (Tex. Crim. App. 2002) ("Appellant confessed to the murder. His identity was not at issue."). Lower courts found that identity was not at issue if a defendant admitted he was with the victim at the time of the alleged assault and later pleaded not guilty. *See Morris v. State*, 110 S.W.3d 100, 103 (Tex. App. – Eastland 2003, pet. ref'd).

  Resolution: Legislature amended Article 64.03 to include provision that "the convicting court is prohibited from finding that identity was not an issue in the case solely on the basis of that plea, confession, or admission." Acts 2007, 80th Leg., ch. 1006, § 4, eff. Sept. 1, 2007.

- **Article 11.65**. Timely Release of exonerated persons. A postconviction application for writ of habeas corpus alleging actual innocence based on exculpatory forensic evidence testing is decided by the Texas Court of Criminal Appeals.

> ***Resolution:*** Article 11.65 of the Texas Code of Criminal Procedure authorized bond for persons with pending applications for writ of habeas corpus. Added by Acts 2003, 78th Leg., ch. 197, § 1, eff. June 2, 2003.

Article 11.07 of the Texas Code of Criminal Procedure was also amended by the Legislature in 2007 to add "additional forensic testing" for non-DNA evidence as one of the evidentiary tools a trial court can order while resolving a postconviction application for writ of habeas corpus. This provision provides a procedure for testing non-DNA evidence in addition to Ch. 64 for DNA testing. Acts 2007, 80th Leg., ch. 1006, § 1, eff. Sept. 1, 2007. The Legislature obviously recognized the need for forensic evidence testing in postconviction habeas proceedings in addition to postconviction DNA testing under Chapter 64. Art. 11.07(3)(d) provides for court appointment of counsel. Although this provision does not specifically provide for testing DNA evidence, postconviction habeas applicants can still obtain DNA testing through Art. 11.07 since counsel (appointed or retained) for the habeas applicant under that provision would be ethically bound (and not prohibited by Art. 11.07) to undertake any appropriate measure, including filing of a motion under Ch. 64. Also, court appointed counsel under Art. 11.071 (Procedure in Death Penalty Case) for a writ of habeas corpus application in a death penalty case would be under the same obligation in view of the requirement under Section 3(a) to "investigate . . . the factual and legal grounds" for the application which would include seeking testing of DNA and non-DNA evidence. TEX. CRIM. PROC. CODE ANN. art. 11.071, § 3(a) (Vernon 2005). A postconviction habeas applicant under Art. 11.07 or Art. 11.071 can therefore obtain both DNA and non-DNA evidence testing. Ch. 64, Art. 11.07 and Art. 11.071 effectively provide access to DNA evidence.

In summary, Texas statutory postconviction DNA testing procedures work because the Legislature has had nine (9) years to hone Chapter 64 and address issues that have arisen during that time period. As shown above, the Legislature has actively revised Chapter 64 and other relevant statutes to ensure that a convicted persons is not deprived of access to forensic testing when reasonable grounds show that he or she would not have been convicted had such testing resulted in exculpatory evidence.

III. Survey of Texas Prosecutors Shows Chapter 64 is Effective in Permitting DNA Testing and Achieving Exonerations.

The Texas Task Force on Indigent Defense (TTFID)[1] and the Texas District & County Attorneys

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[1] The Task Force on Indigent Defense (http://www.courts.state.tx.us/tfid/) is a standing committee of the Texas Judicial Council and was established by the 77th Legislature (2001) to provide technical support to assist counties in improving their indigent defense systems, and to direct the comptroller to distribute funds, including grants, to counties to provide indigent defense services. The Texas Judicial Council is the policy-making body for the state judiciary and was created in 1929 by

(Continued on following page)

Association (TDCAA)[2] undertook a survey of district attorneys in 2010 to collect data pertaining to Ch. 64 motions filed since Ch. 64 was enacted in 2001. The report of that survey is included in Appendix 1 to this Brief. The counties of the 75 district attorneys who responded included 82.5 percent of the state's population. The report's conclusion, in part, states:

> Legislators approved Senate Bill 3 during 2001's 77th legislative session. This bill required the Texas Department of Public Safety to conduct DNA tests for convicted persons in certain cases. The DNA tests conducted excluded 23 convicted persons, as self reported by the counties, or 20.9 percent of tested cases. Another 21 cases, or 19.1 percent, were inconclusive. The remaining 66 cases, or 60 percent, confirmed the conviction as the convicted person's DNA was included by the test. Overall there were 18 exonerations resulting from the 1023 motions for DNA testing filed and ruled upon by the courts, or 1.8 percent.

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the 41st Legislature to continuously study and report on the organization and practices of the Texas judicial system. (http://www.courts.state.tx.us/tjc/tjchome.asp).

[2] The Texas District and County Attorneys Association (http://www.tdcaa.com/about) is a non-profit organization providing technical assistance to the prosecution community and related criminal justice agencies and serves as a liaison between prosecutors and other organizations in the administration of criminal justice.

The letter (dated March 16, 2010) by TTFID and TDCAA explaining the survey to those contacted and Tarrant County's response to the survey are included as Appendix 2 to this Brief. In Tarrant County, for example, approximately 150 motions for postconviction DNA testing under Chapter 64 (including 128 requests for counsel to assist in filing Ch. 64 motions) have been filed in the criminal courts during the period from April 5, 2001 (effective date of statute) through April, 2010. Eighteen (18) motions for DNA testing were granted in Tarrant County cases. As of September 1, 2010, DNA tests pursuant to these motions have concluded with one (1) exoneration and nine (9) confirmations of guilt. Three (3) tests were pending as of September 1, 2010 and five (5) had been determined to be inconclusive. Tarrant County also had one request under Article 11.07 (pertaining to postconviction habeas procedures in non-death penalty cases), Texas Code of Criminal Procedure, for DNA testing. (Counsel appointed under Art. 11.07 filed a Ch. 64 motion.) That request is currently pending before the trial court. The provision for postconviction forensic (non-DNA) testing was added to Article 11.07 in 2007.[3] (*See* discussion of Art. 11.07 above in II above.)

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[3] Texas Code of Criminal Procedure, Chapter 11 (Habeas Corpus), Art. 11.07 in relevant part, provides (italics added) that:

> Sec. 1. This article establishes the procedures for an application for writ of habeas corpus in which the

(Continued on following page)

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applicant seeks relief from a felony judgment imposing a penalty other than death.

. . .

(d) *If the convicting court decides that there are controverted, previously unresolved facts* which are material to the legality of the applicant's confinement, it shall enter an order within 20 days of the expiration of the time allowed for the state to reply, designating the issues of fact to be resolved. To resolve those issues *the court may order* affidavits, depositions, interrogatories, *additional forensic testing,* and hearings, as well as using personal recollection. The state shall pay the cost of additional forensic testing ordered under this subsection, except that the applicant shall pay the cost of the testing if the applicant retains counsel for purposes of filing an application under this article. *The convicting court may appoint an attorney* or a magistrate to hold a hearing and make findings of fact. An attorney so appointed shall be compensated as provided in Article 26.05 of this code. It shall be the duty of the reporter who is designated to transcribe a hearing held pursuant to this article to prepare a transcript within 15 days of its conclusion. *After the convicting court makes findings of fact* or approves the findings of the person designated to make them, *the clerk* of the convicting court *shall immediately transmit to the Court of Criminal Appeals,* under one cover, the application, any answers filed, any motions filed, transcripts of all depositions and hearings, any affidavits, and any other matters such as *official records used by the court in resolving issues of fact.*

(e) For the purposes of Subsection (d), "additional forensic testing" does not include forensic DNA testing as provided for in Chapter 64.

IV. Petitioner's Claim of "As Applied" Denial of Due Process Is Not Supported by Law or the Undisputed Facts of This Case.

Skinner has not asserted that Ch. 64 is facially unconstitutional but only that, as applied in his case, he was denied procedural due process. He appealed both cases in which his Ch. 64 motions were denied and both times, the Texas Court of Criminal Appeals affirmed the denial. *Skinner v. State of Texas*, 122 S.W.3d 808 (Tex. Crim. App. 2003); *Skinner v. State of Texas*, 293 S.W.3d 196 (Tex. Crim. App. 2009) In neither instance did he file a petition for writ of certiorari in this Court.

Texas Ch. 64 is at least equivalent to the federal statute approved in *Osborne*, is a judicial procedure and cannot be applied by a prosecutor in a manner to deny procedural due process. *Osborne, supra* at 2317. Texas criminal courts decide postconviction DNA motions. Ch. 64 permits appeal of trial and intermediate court rulings and decisions to Court of Criminal Appeals after which there can be a direct appeal on writ of certiorari to this Court. A Texas district attorney does not "apply" Ch. 64 but simply responds pursuant to the requirements of the statute to the filing of the motion and therefore is not a proper defendant in a Section 1983 suit any more than he or she would be for not complying (in a manner that a defendant wanted) with a ruling of a court under any other provision of the Code of Criminal Procedure. If Ch. 64 provided that a district attorney had a particular function or duty not subject to court review, the district attorney could arguably be made a Section 1983 defendant if the failure to act or abuse of discretion violated the defendant's procedural due process. That is not the case here.

Title 42 U.S.C. Section 1983 "has two basic requirements: (1) state action that (2) deprived an individual of federal statutory or constitutional rights." *Harajli v. Huron Twp.*, 365 F.3d 501, 505 (6th Cir. 2004); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 947 (1982). Since a Texas prosecutor does not apply the statute and therefore cannot cause a denial of procedural due process, a suit under Section 1983 against a prosecutor for postconviction DNA testing is subject to dismissal for failure to state a claim (since there would be no "state action" by the prosecutor) under Rule 12(b)(6), Federal Rules of Civil Procedure, Skinner has not identified how Switzer violated his procedural due process other than responding to his requests in manner consistent with two prior court rulings. Skinner's suit is in fact premised on Switzer's action (or inaction) that was consistent with a court ruling: "As a result of the decisions of the CCA [Texas Court of Criminal Appeals] denying Plaintiff postconviction DNA testing under Art. 64, the Defendant has refused and continues to refuse to make available to Plaintiff any DNA material for testing." (Complaint, ¶ 31) Under Ch. 64, it is a court that grants or denies access to DNA evidence, not the prosecutor.

Procedural due process protects the individual against arbitrary government action. *Wolff v.*

McDonnell, 418 U.S. 539, 558 (1974). To demonstrate a violation of his procedural due process rights, a plaintiff must establish that: (1) he possesses a protected liberty or property interest; and (2) the procedures utilized in his circumstances were inadequate. *See Hennigh v. City of Shawnee*, 155 F.3d 1249, 1253 (10th Cir. 1998). An "as-applied challenge" requires an analysis of the facts of a particular case to determine whether the application of a statute, even one constitutional on its face, deprived the individual to whom it was applied of a protected right. *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 174 (2nd Cir. 2006). Ch. 64 clearly provides that, consistent with the procedures set forth in the statute, the judge of the convicting court (not the district attorney) decides whether a defendant is entitled to access to DNA evidence. Petitioner has not shown that Switzer "applied" the statute to him and Respondent's Brief clearly sets out reasons why the rulings of the trial court and Court of Criminal Appeals were not arbitrary or capricious or otherwise applied Ch. 64 in an unconstitutional manner in his case.

V. Allowing Section 1983 Action to Obtain DNA Testing Would Result in Burdensome Litigation.

There would be a substantial burden incurred by prosecutors and counties (e.g. need for hiring additional legal staff or law firm) to defend Section 1983 suits by convicted defendants that would likely result from a ruling in Skinner's favor. Texas district attorneys who would be sued under Section 1983 for postconviction DNA cannot necessarily assume or expect that the Texas Attorney General will undertake their representation in those cases even though the Attorney General's Office has traditionally represented the State in federal postconviction habeas actions and suit against a district or county attorney in an official capacity would in actuality be a suit against the State. *Echols v. Parker*, 909 F.2d 795, 801 (5th Cir. 1990) (holding that a Texas district attorney is a state official when instituting criminal proceedings to enforce state law); *Quinn v. Roach*, 326 Fed.Appx. 280 (5th Cir. 2009); *Will v. Mich. Dep't of State Police,* 491 U.S. 58, 71 (1989) (clarifying that suits against state officials in their official capacity are no different from suits against the state itself).

Petitioner Skinner only briefly discusses the added burden to the courts that would result from allowing Section 1983 suits for postconviction DNA testing. It is important to recognize that the Prison Litigation Reform Act of 1995, Section 101(a), 42 U.S.C. Section 1997e(a) is not a cure-all for sifting through the civil suits that would be filed to circumvent habeas restrictions. There would be a substantial added burden on federal judges in screening *pro se* pleadings under the PLRA and 28 U.S.C. Section 1915A where there is an extensive litigation history and substantial trial, appellate and habeas records. Service of summons on the defendant(s) and filing of responsive pleadings or Rule 12(b) motions could occur in many cases. It would seem unlikely that the courts would or could grant Rule 12(b)(6) motions and dismiss cases since the pleadings would be taken as true under Rule 12(b) and the courts might be hesitant to consider records outside the pleadings. *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 340 (5th Cir. 2008) (finding that because a 12(b)(6) "review is limited to his complaint and its proper attachments, we may not consider any additional evidence or pleadings.") A case may be dismissed for failure to state a claim "only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Bulger v. United States Bureau of Prisons*, 65 F.3d 48, 49 (5th Cir. 1995). A dismissal for failure to state a claim is reviewed *de novo*. *Black v. Warren*, 134 F.3d 732, 733 (5th Cir. 1998). "Due process is inevitably a fact-intensive inquiry." *Krimstock v. Kelly*, 306 F.3d 40, 51 (2nd Cir. 2002); *Connecticut v. Doehr*, 501 U.S. 1, 10 (1991) ("[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.") It would seem that federal judges screening cases and deciding Rule 12(b)(6) motions would have to relax the rule restricting consideration to the complaint itself and documents attached to it and necessarily review court records in the related criminal proceedings. Such analysis would seem at best to be time consuming. In cases in which the plaintiff was a *pro se* inmate, it is unlikely that a federal judge could easily identify and obtain the relevant records for review other than by ordering the defendant prosecutor to file the appropriate court records from the criminal case(s).

Would federal judges be inclined in a Section 1983 action regarding DNA testing to appoint counsel as in federal habeas proceedings? If a postconviction DNA testing Section 1983 case is not dismissed under the PLRA or Section 1915A screening or under Rule 12(b)(6), it would then be necessary for the defendant(s) to file responsive pleadings, asserting any affirmative defenses and, unless the appropriate defendant is willing to concede a constitutional violation and agree to injunctive and/or declaratory relief, file a motion for summary judgment seeking dismissal of the action. What would a Rule 56 motion for summary judgment on the merits need to address? Would it be more cost effective to simply proceed to a bench trial? A bench trial would of necessity have to re-examine the legal grounds and evidentiary support for prior rulings of state and federal courts. In this case, Petitioner's counsel also filed a motion for preliminary injunction. Rule 65, Federal Rules of Civil Procedure, requires a hearing before a preliminary injunction is issued. This litigation would undoubtedly entail significant expenditure of resources and be time consuming to federal courts and local or state government.

Allowing a Section 1983 suit to be filed after postconviction denials of request for DNA testing would require district courts to determine whether a plaintiff's procedural due process rights, when considered within the framework of the state's procedures for postconviction relief, were violated. This may be no easy chore for the federal court and would likely require review of state criminal court records and the expenditure of time of prosecutors and state court personnel for the federal court to be able to even screen a *pro se* complaint under the PLRA. "Defending" even a well-pled Section 1983 based on denial of postconviction access to DNA evidence would necessarily require, at minimum, defense counsel to review the factual allegations, court records and documents submitted with the complaint and citation to cases relating to the underlying prosecution (appeals and state and federal habeas) for completeness. It is unlikely that a federal judge could even preliminarily determine that there was a reasonable basis to conclude that a plaintiff's procedural due process rights were violated due to the manner in which the state postconviction DNA statute was applied in a plaintiff's case on the basis of the complaint alone.

VI. Allowing Section 1983 Action to Obtain DNA Testing Would Require Resolution of Numerous, Difficult Legal Issues.

A. ***Accrual of cause of action***. An unresolved question is when a cause of action (based on a constitutional tort) would accrue or the statute of limitations begins to run on a postconviction DNA testing Section 1983 if a prosecutor denied a request for "agreed" testing. If there is no "free standing" right, as the Court decided in *Osborne*, there can be no violation by the prosecutor. The prosecutor cannot be faulted for denying a right that does not exist. Plaintiff's Complaint (¶31) states:

> As a result of the decisions of the CCA denying Plaintiff post-conviction DNA testing under Art. 64, the Defendant has refused and continues to refuse to make available to Plaintiff any DNA material for testing. Her most recent refusal was in a telephone conference with Plaintiff's counsel on November 25, 2009.

What Petitioner was trying to allege in the foregoing that is relevant to the cause of the alleged injury and the date of the injury is unclear. In *Savory v. Lyons*, 469 F.3d 667, 673 (7th Cir. 2006), the Court, in affirming dismissal of the Section 1983 action as barred by the statute of limitations, found that: "The district court determined that the relevant accrual date was July 7, 1998, the date on which the Illinois circuit court denied Savory's request for DNA testing under Illinois law." The Court of Criminal Appeals denied Skinner's second Ch. 64 motion on September 23, 2009. ***Skinner** v. **State of Texas***, 293 S.W.3d 196 (Tex. Crim. App. 2009). His previous Ch. 64 motion was denied by the Court of Criminal Appeals on December 10, 2003. ***Skinner** v. **State of Texas***, 122 S.W.3d 808 (Tex. Crim. App. 2003). It seems that a Section 1983 action based on the 2003 decision of the Court of Criminal Appeals would be barred by limitations but that Petitioner could bring about another cause of action by filing a subsequent Ch. 64 motion and pursuing it to conclusion in the Court of Criminal Appeals which is exactly what Skinner did, in effect re-starting the statute of limitations. In *Spencer v. Lee*, 864 F.2d 1376 (7th Cir. 1989) (en banc), cert.

denied, 494 U.S. 1016 (1990), the Court determined that the use of court proceedings (to safeguard the detention and mental commitment process) did not elevate the process to that of "state action" for Section 1983 purposes. It appears that there is no "state action" under the facts of this case that would serve as a basis for a Section 1983 claim.

As noted, Ch. 64 does not limit the number of motions for postconviction DNA testing that can be filed. Allowing a Section 1983 action to be used to obtain postconviction DNA testing would enable a convicted person to effectively appeal every decision of the Court of Criminal Appeals regarding postconviction DNA testing in a criminal case to a federal district court as a civil case. Petitioner's reference to Switzer's refusal of access to DNA evidence "in a telephone conference with Plaintiff's counsel" implies that such refusal constituted an actionable injury. Even though Texas has enacted a formal procedure in Chapter 64, including the requirement for filing of a written motion in the convicting court, it appears that Skinner is alleging that he could trigger a constitutional violation or re-start the limitations period by a simple phone call to the District Attorney – even after his Ch. 64 motion(s) were denied. The District Attorney's merely not agreeing to voluntarily make DNA evidence available for testing or not testing DNA evidence is not an application of the state statute.

B. ***Proper Defendant.*** It is not clear who the proper defendant parties might be in a postconviction

DNA testing Section 1983 action where an affirmative injunction is sought. The DNA sought for testing may not be in the actual physical possession of the prosecutor's office. If all that is necessary is access to DNA evidence, declaratory relief would not seem appropriate or necessary in conjunction with the injunctive relief. Skinner asked for injunctive and declaratory relief in his complaint and filed a separate "Motion For Preliminary Injunction" asking that the court issue:

> a preliminary injunction declaring that Defendant's continued withholding of the evidence violates his constitutional rights and requiring Defendant to release the evidence enumerated in the Complaint's Prayer for Relief to Mr. Skinner in order that such evidence can be subjected to forensic DNA testing.

Claims like Skinner's would likely raise numerous, difficult questions of procedural and substantive law for the courts and officials involved that will be expensive to litigate. Skinner claims that Ch. 64 was arbitrarily applied against him, but DA Switzer did not apply the statute. Indeed, she is entitled to withhold DNA evidence where the Texas criminal courts denied Skinner's Ch. 64 motions. As to the limitations question, Skinner asserts that his claim accrued when the Court of Criminal Appeals ruled on his Ch. 64 motion appeal. This would however mean that: (1) Skinner has arguably sued the wrong defendant and (2) *Rooker-Feldman* would bar his claim. *Rooker* *v. Fidelity Trust Co.*, 263 U.S. 413, 415-416 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983).

C. ***Damages – Compensatory and Punitive.*** Section 1983 authorizes actual/compensatory damages as well as punitive damages for a constitutional violation. Skinner is not seeking damages but unless the Court decides that compensatory and punitive damages cannot be sought in a postconviction DNA testing Section 1983 action, it seems likely that at least some *pro se* plaintiffs will seek both types of damages against anyone whom they believe might have prevented access to DNA evidence and sue prosecutors, investigators and laboratory staff in their individual (personal) capacities. There would seemingly be no procedural bar to include a claim for damages. Absolute prosecutorial immunity would not necessarily be extended to bar damage claims against investigators, crime lab staff and other non-prosecutorial officials.

D. ***Prosecutorial Immunity.*** Another question that seems to not have been resolved is whether a prosecutor's decision to deny a request for postconviction DNA access or testing is clearly prosecutorial in nature. The pendency of a judicial proceeding is logically related to the determination whether a prosecutor's "activities [are] intimately associated with the judicial phase of the criminal process, and thus [are] functions to which the reasons for absolute immunity apply with full force." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *Cousin v. Small*, 325 F.3d

627, 636 (5th Cir. 2003). In reality, simply being named as a defendant often causes distraction from the defendant's normal duties. As this Court has observed, " . . . permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). It is almost inevitable that plaintiffs would sue officials and employees other than prosecutors who will not have absolute immunity and will have to invoke qualified immunity.

E. *Eleventh Amendment Immunity.* Eleventh Amendment immunity shields state officials from official capacity suits. *Krainski v. Nevada ex rel. Board of Regents of Nevada System of Higher Education*, ___ F.3d ___, 2010 WL 2991397, at *3 (9th Cir. 2010) A narrow exception exists "where the relief sought is prospective in nature and is based on an ongoing violation of the plaintiff's *federal* constitutional or statutory rights." The doctrine of *Ex parte Young* allows a suit against a state official to go forward, notwithstanding the Eleventh Amendment's jurisdictional bar, only where the suit seeks prospective injunctive relief in order to end a continuing federal law violation. *Ex parte Young*, 209 U.S. 123 (1908); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996). In *Savory v. Lyons*, 469 F.3d 667, 673 (7th Cir. 2006), the Court held that the state's failure to release physical evidence for postconviction DNA testing was not a continuing violation. It appears that the type of suit brought by Skinner may be barred by the Eleventh Amendment.

Allowing traditional civil rights suits to obtain DNA testing in addition to state statutory DNA testing procedures and federal habeas would place DNA testing "outside the process," which the majority in *Osborne* recognized and rejected:

> The criminal justice system . . . is a time-tested means of carrying out society's interest in convicting the guilty while respecting individual rights. That system, like any human endeavor, cannot be perfect. DNA evidence shows that it has not been. But there is no basis for Osborne's approach of assuming that because DNA has shown that these procedures are not flawless, DNA evidence must be treated as categorically outside the process, rather than within it. That is precisely what his §1983 suit seeks to do, and that is the contention we reject.

Osborne, *supra* at 2323. That is also precisely what Skinner's Section 1983 suit seeks to do.

◆

CONCLUSION

For the reasons above and those set out in Respondent's Brief, the decision of the Fifth Circuit should be affirmed.

Respectfully submitted,

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September 16, 2010

APPENDIX 1

TO: Cory Pomeroy, General Counsel for State Senator Robert Duncan

FROM: Jim Bethke, Executive Director, Texas Task Force on Indigent Defense

and

Rob Kepple, Executive Director, Texas District and County Attorneys Association

RE: POST-CONVICTION DNA TESTING SURVEY

DATE: September 13, 2010

In response to Senator Duncan's request for information concerning the effectiveness of Senate Bill 3 (77th R.S., 2001), Texas' post-conviction DNA testing law, we are providing you with this summary of the information collected by the Public Policy Research Institute at Texas A&M University.

Background

Legislators approved Senate Bill 3 authored by Senator Duncan during 2001's 77th legislative session. The bill created Chapter 64, Code of Criminal Procedure, to establish a procedure for post-conviction forensic DNA testing. SB 3 authorized a convicted person to ask a court for a DNA test, require the court to order a test if certain conditions were met, and require courts to appoint and compensate attorneys for indigent defendants seeking to file such motions if certain conditions are met, and allow appeals of court decisions relating to DNA tests.

Since the passage of the bill there has been a dearth of comprehensive information on its impact and the extent of its use. There is no single point of contact for collecting such information and so we have not known how many applications for relief have been filed, litigated, and granted or denied. It was with this in mind that Senator Duncan's office asked the Task Force on Indigent Defense (Task Force) to help determine the impact of the law. The Task Force partnered with the Texas District and County Attorneys Association to develop a survey instrument to send to each elected district attorney in the state since we thought they would be in the best position to compile and report the information. A survey was sent out in March 2010 to the state's 154 district attorneys and responses have been received from April through August 2010. The Public Policy Research Institute at Texas A&M sent out and collected the results of the eight-question survey. The survey instrument is included as Appendix 1.

Respondents

Of the 154 district attorneys in the state, 75 returned surveys, for a response rate of 48.7 percent. The 75 district attorneys cover 107 of the 254 counties in Texas or 82.5 percent of the residents (20.5 million of 24.8 million). Texas has 18 counties containing over 250,000 residents, and 11 of those returned their surveys, including the top six counties by population: Harris, Dallas, Tarrant, Bexar, Travis and Collin. Additionally, Texas has one district attorney covering both Webb and Zapata counties, which have a combined population of 255,474. Table 1 provides the population and response status for all district attorneys serving populations above 250,000.

Table 1: Responses from District Attorneys in counties with over 250,000 residents

County	2009 Population[1]	Response Provided
Harris	4,070,989	Yes
Dallas	2,451,730	Yes
Tarrant	1,789,900	Yes
Bexar	1,651,448	Yes
Travis	1,026,158	Yes
Collin	791,631	Yes
El Paso	751,296	
Hidalgo	741,152	Yes
Denton	658,616	Yes
Fort Bend	556,870	
Montgomery	447,718	
Williamson	410,686	Yes
Cameron	396,371	Yes
Nueces	323,046	
Brazoria	309,208	
Galveston	286,814	Yes

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[1] Population data for 2009 from US Census Bureau, State and County Quickfacts, http://quickfacts.census.gov/qfd/states/48000.html

Bell	285,787	
Lubbock	270,550	
Webb & Zapata	255,474	Yes

The mean population for the jurisdictions of the 75 respondents was 237,174 in 2009 and ranged from 6,109 (Crosby County) to 4,070,989 (Harris County). The majority of the respondents represent rural counties. Table 2 shows the population distribution for the respondents.

Table 2: Respondent population distribution

	Count	Percent of Respondents	Percent of Counties in Texas
Rural (Under 50,000)	53	62.4%	76%
Mid Sized (50,000-250,000)	20	23.5%	17%
Urban (250,000+)	12	14.1%	7%

Although mid-sized and urban jurisdictions are overrepresented in the responses, these areas are most likely to have the bulk of Chapter 64 motions for post-conviction forensic DNA testing. Note that 16 of the responding district attorneys have jurisdictions covering multiple rural counties.

Results[2]

The respondents reported a collective total of 929 requests for counsel to assist in filing Chapter 64 motions for post-conviction forensic DNA testing submitted by convicted persons since January 1, 2001. The average number was 14. Dallas County had the maximum with 500, which was also an extreme outlier in the survey. Tarrant County had the next highest reported number at 128. There were 33 respondents who reported no instances.

Next, respondents provided the number of Chapter 64 motions received and detailed the sources. The district attorneys reported having received 1132 motions between January 1, 2001 and April 2010. Over half were filed by court-appointed counsel. Table 3 gives the origination breakdown. The results are also split into the three population categories discussed above.

Table 3: Total number of Chapter 64 motions received by county size

	Ch. 64 Motions Received	Filed By Court-Appointed Counsel	Filed Pro Se	That Fell Into Neither Category
Rural	60	12	48	2
Mid Sized	90	16	73	2
Urban	982	581	313	34

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[2] Appendix 1 contains all responses.

Total	1132	609	434	38
Percent of Motions Received		53.8%	38.3%	3.4%

Urban counties, by far, had the highest collective number of motions received and motions filed by court appointed counsel. Overall Pro Se filings were higher in urban counties; however defendants were much more likely to file their motions Pro Se in rural and mid-sized counties than in urban counties.

Most requested Chapter 64 motions were denied. The total number granted was 125, which is 11 percent of those requested. Almost two-thirds (65.6%) of those granted were filed by court appointed counsel. Table 4 describes motions granted.

Table 4: Total number of Chapter 64 motions granted by county size

	Ch. 64 Motions Granted	Filed By Court-Appointed Counsel	Filed Pro Se	That Fell Into Neither Category
Rural	8	7	6	1
Mid Sized	4	3	12	1
Urban	113	72	17	17
Total	125	82	35	19
Percent of Motions Received		65.6%	28%	15.2%

Urban counties received the bulk of the 125 granted Chapter 64 motions. They received 90.4 percent of those filed.

It is important to note a data discrepancy in the self reported figures. The question "how many chapter 64 motions for post-conviction forensic DNA testing has your jurisdiction received" was reported to be 1132. Question 3 then inquired on the number granted, which was 125, then Question 4 asked how many have been denied, which was 897. This is a total of 1023 cases (granted plus denied), which is not the same as the total number of motions from Question 2. The 110-motion discrepancy may be the result of motions that are pending before courts or withdrawn by petitioners. It could also be due to the nature of the survey since most do not have a tracking system in place and many counties noted that they used estimates, not records, to report this information.

Additional reasons for the discrepancy were noted by Dallas County and Collin County. Dallas County commented on Question 4: *Please note that the trial court "dismissed" the Chapter 64 motions in 12 cases, which are not included in the above answer to question 4.* Collin County noted for Question 5: *Two of the seven appeals are pending.* Therefore, we believe the lack of coherent standards on recording and reporting are the most likely causes of the incongruities.

Respondents reported 898 Chapter 64 motions for post conviction forensic DNA testing have been denied since January 1, 2001. Assuming a total of 1,023 requests that have been ruled upon (summation of 125 granted and 898 denied), 87.8 percent of requests are denied and 12.2 percent granted. Table 5 reports the number and percentage of motions denied.

Table 5: Chapter 64 motions requested, granted and denied by county size

	Ch. 64 Motions Requested	Ch. 64 Motions Granted	Ch. 64 Motions Denied	Percent Ch. 64 Motions Denied
Rural	64	8	56	87.5%
Mid Sized	81	4	77	95.1%
Urban	878	113	765	87.1%
Total	1023	125	898	87.8%

Urban and rural counties slightly deviated from the total rate of Chapter 64 motion denials. Midsized counties had the only statistically significant denial rate at 95.1 percent.

If a defendant has a motion denied by the district court, the defendant can appeal the decision. The respondents indicated there were appeals following 265 denials, or 29.5 percent of total motions denied. Table 6 shows the number of appeals filed and granted.

Table 6: Appeals process by county size

	Ch. 64 Motions Denied	Ch. 64 Denials Appealed	Percent of Denials Appealed	Ch. 64 Appeals Granted
Rural	56	12	21.4%	5
Mid Sized	77	19	24.6%	0
Urban	765	234	30.6%	5
Total	898	265	29.5%	10

Rural counties appealed 21.4 percent of issued denials and were granted 41.7 percent of those appeals. Midsized counties filed slightly more appeals than rural counties, but did not receive any. Urban counties filed the most and were largely responsible for the total

Once the convicted persons were granted their Chapter 64 motions for post-conviction forensic DNA testing, 20.1 percent of the tests excluded the convicted person. Table 7 shows the results for Chapter 64 DNA testing.

Table 7: Chapter 64 Results and Outcomes

	Number of Inclusions	Number of Exclusions	Number Found Inconclusive	N
Rural	6	0	2	
Midsized	2	1	1	
Urban	58	22	18	
Total	66	23	21	

The DNA tests resulted in the exclusion of 23 people. These 23 exclusions resulted in 18 exonerations: 17 from urban counties and one from a midsized county. The survey results do not explain this discrepancy.[3] The net result is that a total of 1.8 percent of the original 1023[4] Chapter 64 motions received and ruled upon resulted in exoneration.

The lab work for Chapter 64 motions was conducted by the Texas Department of Safety (DPS), a DPS affiliated lab, or a private lab with no affiliation to a given jurisdiction. The respondents reported using the DPS or DPS affiliated lab in 114 cases and a private lab in 23 cases, i.e. a DPS or affiliated lab conducted 83.2 percent of post-conviction forensic DNA tests. Table 8 elaborates on the breakdown of lab use.

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[3] As mentioned earlier, this discrepancy between exclusions and exonerations may indicate pending court cases or related delays, but the specific cause of the discrepancy could not be determined using existing survey data.

[4] As noted in Table 3's discussion, there is a difference in total motions reported. If 1132 Chapter 64 motions are used, then the result is 1.6 percent of cases result in exoneration.

Table 8: Type of Lab used

	Total Number of Ch. 64 DNA Test	Number of Ch. 64 analyzed at DPS or Affiliated Lab	Percent of Ch. 64 analyzed at DPS or Affiliated Lab	Number of Ch. 64 analyzed at Private Lab
Rural	23	21	91.3%	2
Midsized	4	2	50%	2
Urban	110	91	82.7%	19
Total	137	114	83.2%	23

The urban lab usage clearly drove the total, because those district attorneys had over three times the amount of requests as the rural and midsized counties combined. Urban counties relied on private labs for 17.3 percent of their analyses.

Conclusion

Legislators approved Senate Bill 3 during 2001's 77th legislative session. This bill required the Texas Department of Public Safety to conduct DNA tests for convicted persons in certain cases. The DNA tests conducted excluded 23 convicted persons, as self reported by the counties, or 20.9 percent of tested cases. Another 21 cases, or 19.1 percent, were inconclusive. The remaining 66 cases, or 60 percent, confirmed the conviction as the convicted persons DNA was included by the test. Overall there were 18 exonerations resulting from the 1023 motions for DNA testing filed and ruled upon by the courts, or 1.8 percent. It is also important to note that DNA testing may be done outside the Chapter 64 procedures. This would include testing done by the agreement of the parties or on the district attorney's own initiative. The total number of DNA exonerations in Texas from all sources currently stands at 40.

Appendix 1: Survey Instrument and Responses

Questionnaire For Texas Counties Regarding Chapter 64, Code of Criminal Procedure, Motions For Post-Conviction Forensic DNA Testing

- -

Question 1: How many **REQUESTS FOR COUNSEL** to assist in filing CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING have been submitted by convicted persons in your jurisdiction since **January 1, 2001**?

Number of Requests for Counsel: 929

Question 2: How many CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING has your jurisdiction **RECEIVED** since **January 1, 2001**? Of those received, how many of those were filed on behalf of inmates by court-appointed counsel, how many were filed pro se, and how many fell into neither of these two categories?

# of Ch. 64 Motions Received	# Filed By Court-Appointed Counsel	# Filed Pro Se	# That Fell Into Neither Category
1132	609	434	37

Question 3: Of those CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING filed, how many have been **GRANTED** in your jurisdiction since **January 1, 2001**? Of those granted,

how many of those were filed on behalf of inmates by court-appointed counsel, how many were filed pro se, and how many fell into neither of these two categories?

# of Ch. 64 Motions Granted	# Filed By Court-Appointed Counsel	# Filed Pro Se	# That Fell Into Neither Category
125	82	35	19

Question 4: Of those CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING filed, how many have been **DENIED** in your jurisdiction since **January 1, 2001**?

Number of Ch. 64 Motions Denied: 897

Question 5: How many of the CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING denied by your district court(s) were appealed? Ultimately granted?

Number of Denials Appealed: 265
Number of Appeals Granted: 10

Question 6: How many CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING resulted in "Inclusion" of the inmate? "Exclusion"? Found "Inconclusive"?

# of Inclusions	# of Exclusions	# Found Inconclusive
66	23	21

Question 7: How many CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING ultimately resulted in the exoneration of the inmate?

Number of Inmates Ultimately Exonerated: 18

Question 8: How many of the CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING were done by a Texas Department of Safety (D.P.S.) Lab or by another lab contractually affiliated to do lab work for your jurisdiction? How many were done by a private lab with no affiliation with your jurisdiction?

# of Ch. 64 Motions by D.P.S. or Affiliated Lab	**# of Ch. 64 Motions by a Private Lab**
114	23

----Thank you for participating in this questionnaire----

APPENDIX 2

[LOGO]

TEXAS TASK FORCE ON
INDIGENT DEFENSE
205 West 14th Street, Suite 700
Tom C. Clark Building (512)936-6994
P.O. Box 12066, Austin, Texas 78711-2066
Fax: (512)475-3450

CHAIR:
THE HONORABLE
SHARON KELLER
Presiding Judge, Court of
Criminal Appeals

VICE CHAIR:
THE HONORABLE
OLEN UNDERWOOD

DIRECTOR:
MR. JAMES D. BETHKE

March 16, 2010

Joe Shannon, Jr.
Criminal District Attorney
401 W. Belknap St.
Fort Worth, TX 76196-0201

Re: Questionnaire on Post-Conviction DNA Testing

Dear Mr. Shannon,

Since the passage of Texas' statutes on post-conviction forensic testing (Chapter 64, CCP) there has been plenty of information – and misinformation – shared about just how many applications for relief have been filed, litigated, and granted or denied. At this point, there is no single point of contact for that information. This would be good information to have when we talk about just how often relief is granted under Chapter 64.

We are inviting you to participate in a research project to study CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING (hereinafter referred to as "Ch. 64 Motions"). Along with this letter is a short questionnaire that asks a variety of questions about Ch. 64 Motions in your jurisdiction and instructions for completing and returning it. The Public Policy Research Institute at Texas A&M is assisting us in compiling the information so please return the questionnaire to them in the pre-addressed stamped envelope.

We hope you will take the time to complete this questionnaire and return it. Your participation is voluntary. Regardless of whether you choose to participate, please let us know if you would like a summary of the findings. To receive a summary, please contact the Task Force on Indigent Defense at the contact listed below.

If you have any questions or concerns about completing the questionnaire or about participating in this study, please contact Austin Shell at the Task Force on Indigent Defense via email (Austin.Shell@courts.state.tx.us) or by telephone (512-463-2508).

Warmest regards,

/s/ Jim Bethke
Jim Bethke
Director
Task Force on Indigent Defense

/s/ Rob Kepple
Rob Kepple
Executive Director
Texas District and County Attorneys Association

County/Counties being completed for: Tarrant County

Survey Instructions

Please read these instructions carefully and completely because it is important that they be followed exactly.

- **Complete the following survey questions to the best of your knowledge and ability.**
- **Please take your time and be accurate in completing these survey questions.**
- **Please ensure the data entered for these survey questions is accurate because it will be incorporated into a much larger report.**
- **Once complete, please return the questionnaire in the enclosed business reply envelope.** You may also mail the survey back to the address below:

  The Public Policy Research Institute
  Texas A&M University
  4476 TAMU
  College Station, TX 77843-4476

If you have any questions or concerns regarding these instructions, completing the survey questions, or about participating in this study, contact us at the Task Force on Indigent Defense via email (Austin.Shell@courts.state.tx.us) or by telephone (512-463-2508).

Please return the questionnaire by April 1, 2010.

THANK YOU.

County/Counties being completed for: Tarrant County

Contact Information Sheet

1. **Which county or counties is this questionnaire being completed for?**
   Tarrant

2. **Name, email, phone number, and address of the individual or individuals completing this questionnaire.**
   Stephen W. Condor
   401 W. Belknap
   Fort Worth, TX 76196-0201

   817-884-1687
   sconder@tarrantcounty.com

THANK YOU.

County/Counties being completed for: Tarrant County

Questionnaire For Texas Counties Regarding Chapter 64, Code of Criminal Procedure, Motions For Post-Conviction Forensic DNA Testing

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Question 1: How many **REQUESTS FOR COUNSEL** to assist in filing CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING have been submitted by convicted persons in your jurisdiction since **January 1, 2001?**

Number of Requests for Counsel: 128

NUMBER CASES COUNSEL APPOINTED: 115

Question 2: How many CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING has your jurisdiction **RECEIVED** since **January 1, 2001?** Of those received, how many of those were filed on behalf of inmates by court-appointed counsel, how many were filed pro se, and how many fell into neither of these two categories?

# of Ch. 64 Motions Received	# Filed By Court-Appointed Counsel	# Filed Pro Se	# That Fell Into Neither Category
150	48	99	3 (Innocence project)

NOTE: In many cases, appointed counsel litigated defendant's previously filed DNA motions.

Question 3: Of those CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING filed, how many have been **GRANTED** in your jurisdiction since **January 1, 2001?** Of those granted, how many of those were filed on behalf of inmates by court-appointed counsel, how many were filed pro se, and how many fell into neither of these two categories?

# of Ch. 64 Motions Granted	# Filed By Court-Appointed Counsel	# Filed Pro Se	# That Fell Into Neither Category
18	10	6	2 (Innocence project)

Question 4: Of those CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING filed, how many have been **DENIED** in your jurisdiction since **January 1, 2001?**
Number of Ch. 64 Motions Denied: 112

Question 5: How many of the CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING denied by your district court(s) were appealed?
Ultimately granted?
Number of Denials Appealed: 31
Number of Appeals Granted: 0

County/Counties being completed for: Tarrant County

Question 6: How many CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING resulted in "Inclusion" of the inmate? "Exclusion"? Found "Inconclusive"?

# of Inclusions	**# of Exclusions**	**# Found Inconclusive**
9	1	5

*3 cases are currently involved in further testing.

Question 7: How many CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING ultimately resulted in the exoneration of the inmate? Number of Inmates Ultimately Exonerated: 1

Question 8: How many of the CHAPTER 64 MOTIONS FOR POST-CONVICTION FORENSIC DNA TESTING were done by a Texas Department of Safety (D.P.S.) Lab or by another lab contractually affiliated to do lab work for your jurisdiction? How many were done by a private lab with no affiliation with your jurisdiction?

# of Ch. 64 Motions by D.P.S. or Affiliated Lab	**# of Ch. 64 Motions by a Private Lab**
16	2

– Thank you for participating in this questionnaire –